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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SHARON BONDS, *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA AND DIRECTOR,
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the requirement imposed by the Court of Appeals for the District of Columbia Circuit that the District Court make an explicit finding of bad faith prior to imposing a preclusive discovery sanction is inconsistent with Fed. R. Civ. Proc. 37, this Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), and the law of the Second, Fourth and Ninth Circuits.

2. Whether the requirement imposed by the Court of Appeals that the District Court make an explicit finding that no lesser sanction would be effective prior to imposing a preclusive discovery sanction is inconsistent with Fed. R. Civ. Proc. 37, this Court's *National Hockey League* decision, and the law of the Seventh Circuit.

3. Whether the Court of Appeals decision below failed to apply the deferential standard of appellate review of discovery sanctions established in this Court's decision in *National Hockey League*.

LIST OF PARTIES

This petition arises from a class action in the District Court for the District of Columbia. Petitioners are the eight individual plaintiffs and the class. The class consists of (a) all current and former female employees who have been employed by the District of Columbia Department of Corrections between April 1, 1989 and date of trial who were adversely affected by the practices of sexual harassment and (b) all current and former male and female employees who have been employed by the Department between April 4, 1991 and date of trial, and who have suffered retaliation for opposing such unlawful employment practices. The eight individual petitioners are Vera Brummell, Barbara Carter, Essie Jones, Bessye Neal, Shivawn Newsome, Tyrone Posey, Teresa Washington, and Sharon Bonds.

Respondents are the District of Columbia and the Director of the District of Columbia Department of Corrections, in her official capacity (collectively "the Department").

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Sharon Bonds, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 93 F.3d 801 (D.C. Cir. 1996) and is reprinted in the Appendix at 1a-22a. That Court's orders denying rehearing and rehearing *en banc* are reprinted in the Appendix at 46a, 47a. The dissenting opinion from the denial of rehearing *en banc* is reprinted in the Appendix at 48a.

The Final Judgment and Order of the District Court is not reported and is reprinted in the Appendix at 43a-45a.

The Memorandum Opinion of the District Court is not reported and is reprinted in the Appendix at 23a-42a.

RULE INVOLVED

This case involves Federal Rule of Civil Procedure 37(b)(2) which states:

> (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> >
> > (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
> >
> > (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
> >
> > (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

> (E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1996. App. 1a. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on November 25, 1996. App. 46a, 47a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition concerns the appropriate standard of appellate review for the imposition of a discovery sanction by a United States District Court. The case is a class action against the District of Columbia Department of Corrections ("the Department") by employees of the Department alleging a pervasive pattern of sexual harassment in the Department. The action was brought under sections 703 and 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. App. 23a. The District Court's jurisdiction rested on 28 U.S.C. § 1331.

The subject of this petition is the Court of Appeals' reversal of a District Court discovery sanction that prohibited the Department from calling non-expert witnesses at trial because of the Department's repeated failure to

answer an Interrogatory requiring it to identify persons with knowledge of the allegations raised in the Complaint. Prior to imposing this sanction, the District Court explicitly warned the Department that failure to respond would result in imposition of that sanction. The District Court made factual findings that (1) the Department had failed to comply with the Court's discovery order despite the explicit warning that sanctions would be imposed, (2) the Department's proffered excuses for its failure to comply with the order were not credible, and (3) it was important to proceed to trial on schedule to ensure that a pattern of retaliatory actions by Department employees against the named plaintiffs, initiated almost immediately after the case was filed, not undermine plaintiffs' ability to present their case.

After a six week trial, at which the Department presented documentary evidence and expert witnesses, cross-examined plaintiffs' witnesses, and presented argument, the jury found in favor of six of the seven individual plaintiffs whose claims were submitted to the jury. The District Court ordered specific relief for the individual plaintiffs and class-wide equitable relief.

On appeal, the Court of Appeals reversed. The panel opinion, authored by Circuit Judge Rogers, held that (1) the discovery sanction imposed by the District Court was tantamount to a sanction of default despite the Department's active participation in the trial and its partial success, (2) because the sanction was tantamount to default, the District Court must find that the Department had acted in bad faith and that no lesser sanction would be effective before imposing such a sanction, and (3) although the District Court had made such findings, the Court of Appeals disagreed with the District Court's findings, albeit without determining that the findings were "clearly erroneous" as required by Federal Rule of Civil Procedure 52(a). In particular, the Court of Appeals stated that the Department's failure to comply with the District Court's discovery order could be excused because

of the level of burden on the Department's attorneys. App. 20a-21a.

A short recitation of the facts of the case is necessary to place the decisions below in context. The Department is an agency of the District of Columbia government that for years has tolerated the most shocking and extreme forms of sexual harassment in open defiance of a federal court order. *See Bundy v. Jackson,* No. 78-1359 (D.D.C. permanent injunction order March 23, 1981). At trial, the eight named plaintiffs and more than twenty other witnesses testified about numerous instances of sexual harassment at the Department. The conduct by supervisors, co-workers, and even high-ranking officials, including the former Director of the Department, Walter Ridley, ranged from crude sexual comments to groping to sexual assaults. In addition, the testimony at trial showed that several supervisors made explicit links between their sexual demands and job benefits. To comprehend the magnitude of the offending conduct, brief examples from the trial testimony are set forth below:

• Class member Virginia King, an officer with the Department, testified that Lt. Reginald Johnson, who directly supervised her husband, told Ms. King that if she did not have sex with him he would make life very difficult for her husband, but that if she did, he would help her get a promotion she had been seeking. 3/13/95 Tr. 28-51. After numerous threats, Ms. King agreed to meet Johnson at a hotel. When they met, Ms. King continued to tell Johnson that she did not want to have sex with him. He raped her. *Id.* at 47-51. When this event was reported to the Director of the Department in January 1991, Lt. Johnson was transferred to another facility. *Id.* at 58-61. Approximately three years later, after the D.C. Department of Human Rights verified Ms. King's complaint, Lt. Johnson was given a two week suspension as the sole penalty. *Id.* at 76; Ex. 525. He was thereafter promoted to Captain.

• Plaintiff Corporal Shivawn Newsome testified that on July 17, 1992, as she was eating lunch at her post, the same Lt. Johnson, her shift commander, knelt down, shoved his face between her legs and made motions as if he were eating. Ex. 551, 542. As Johnson pulled away he licked his lips. Despite a subsequent finding of cause by the EEOC in favor of Ms. Newsome, the Department took no disciplinary action against Lt. Johnson. *Id.*

• Officers Yvonne Brown and Linda Wyatt-Hayes testified that they worked as dispatchers in the Department's Transport Unit where they were supervised by Lt. Laviska Gerald. Lt. Gerald frequently grabbed both women's breasts and made graphic and explicit comments of a sexual nature. *See* 3/3/95 Tr. 144-56, 195-202. In addition, he exposed himself to the women on more than one occasion. In one specific incident, Lt. Gerald announced, "One of ya'll [deleted] is going to give me some [deleted]," grabbed Ms. Wyatt by the arm, and exposed himself. *Id.* at 154-55, 198. Despite complaints to the Administrator of the Transport Unit, Lt. Gerald was not disciplined and persisted in this conduct. *Id.* at 144-56, 195-202; Ex. 229.

The original Complaint in this action was filed November 24, 1993. Almost immediately, the Department initiated retaliatory actions against the plaintiffs. App. 4a-5a. During the pre-trial period, the District Court repeatedly found that the Department had retaliated against one or more of the plaintiffs or their spouses resulting in the issuance of two preliminary injunctions, four separate citations for contempt, and the incarceration of two of the Department's employees.

The first preliminary injunction halted a retaliatory transfer. Subsequently, the Department charged one plaintiff with being absent without official leave even though he had been on extended medical leave and had been granted workers' compensation. Discovery disclosed that the Department had falsified documents related to his absences. Confronted with multiple acts of reprisal, the

District Court issued another injunction on June 7, 1994 protecting all eight plaintiffs and the husband of one plaintiff against further reprisal.

Despite this injunction, retaliatory actions against the plaintiffs continued, which the Department failed to adequately investigate or address. In addition, at an evidentiary hearing before the District Court, the Department's Director admitted that she had failed to disseminate to Department employees the District Court's June 7 injunctive order prohibiting retaliation and had done nothing to notify the employees of its contents despite specific provisions of the Order requiring her to do so. The Court found these acts to be retaliatory and grounds for a contempt citation against the Director. App. 5a. The Department withdrew its appeal of the contempt rulings.

Discovery was proceeding throughout this period, although the Department was constantly late with its responses. On September 21, 1994, the Department was served with an Interrogatory requesting that it identify all persons with knowledge of the facts alleged in the complaint. App. 28a. The Department did not object to the Interrogatory. On October 24, the day its response was due, the Department moved for an extension of time to respond. App. 29a. In an Order dated November 2, the District Court extended the deadline until November 7 but explicitly warned the Department that "any witness not identified in response to Inter. 2 who could reasonably be identified by November 7, 1994 may not be called at trial." J.A. 264.

The Department ignored the November 7 deadline. Three days later, on November 10, the Department filed a response that neither objected to the Interrogatory nor identified a single person with knowledge of the facts alleged in the Complaint. App. 30a-31a. Instead, the response referred the plaintiffs to all the documents produced in discovery and to the testimony of all persons who had been deposed or would be deposed in the action.

At a November 17 status conference, the District Court informed the Department that the sanction identified in the Order of November 2 would be imposed. The Court also expressed a willingness to reconsider its action if the Department filed a motion for reconsideration. App. 31a-32a.

Despite the District Court's signal that the Department could still cure its discovery default and avoid sanctions, the Department waited nearly a month, until only four days remained before the close of non-expert discovery, to submit such a motion. App. 32a. In that motion, the Department claimed that its failure to respond to the Interrogatory was the result of its counsel's failure to understand that individuals had to be identified by name, App. 33a, despite the clear language in the Court's November 2 Order and the fact that the Interrogatory instructions clearly specified the information to be provivded in response to a request to "identify" an individual. Attached to the motion for reconsideration was a list of approximately 1000 names that two paralegals had compiled by pulling out every name mentioned in all the deposition transcripts and documents that had been exchanged by the parties, which the Department claimed was responsive. App. 33a. The list included individuals who clearly had no connection to the case and included people who were deceased. At the December 21, 1994 hearing on the motion for reconsideration, the Department claimed for the first time that there had been a delay in its receipt of the November 2 order. *Id.* The District Court found that this assertion was not credible and that the Department had acted in bad faith. Accordingly, it denied the motion for reconsideration. App. 33a-34a.

Trial began on March 1, 1995 and lasted for more than six weeks. The Department actively contested the case through cross-examination of plaintiffs' fact and expert witnesses and the presentation of its own expert witnesses. The jury found in favor of six of the seven plaintiffs whose

claims were tried to the jury on their claims under Title VII and for five of the plaintiffs on their § 1983 claims. App. 40a-42a.

The Department appealed. After oral argument, the Court of Appeals remanded the record to the District Court to provide a more complete explanation of its decision to impose the sanction. App. 52a. In its response, the District Court recounted the Department's history of delay and retaliation and explained that the threat of a severe sanction was necessary to ensure compliance and to move the case to trial, which was particularly important in light of the possibility that the Department's acts of retaliation could undermine the plaintiffs' ability to put on their case. App. 59a.

Nothwithstanding the District Court s explanation, the Court of Appeals reversed. First, the Court of Appeals held that the sanction imposed by the District Court should be reviewed under the standard of review generally applicable to sanctions of default or dismissal. App. 13a-14a. The Court of Appeals reached this conclusion despite the fact that the Department had retained and exercised its right to introduce documentary and expert testimony, cross-examine the plaintiffs' witnesses, and make opening and closing arguments, and the fact that the jury found against one plaintiff on both of her claims and against another plaintiff on her § 1983 claim. App. 13a.

Applying this heightened standard, the Court of Appeals then held that the District Court had to find that such a severe sanction was necessary either to avoid prejudice to the plaintiffs or the court's calendar, prevent a benefit to the Department, or deter future misconduct based on flagrant or egregious past misconduct. App. 14a. Although the District Court had made just such findings of fact, the Court of Appeals rejected the findings without determining them to be clearly erroneous under Rule 52(a), and reversed. App. 15a-20a.

A timely petition for rehearing and rehearing *en banc* was denied. App. 46a, 47a. Circuit Judge Tatel (joined by Circuit Judges Wald and Sentelle) dissented. App. 48. In his dissenting statement, Judge Tatel indicated the case was worthy of *en banc* review because it "presents a fundamental question of district court power to control discovery proceedings and of appellate court authority to override district court decisions." *Id.* He warned that "Appellate courts must use great caution in overruling district judges in the way they run their courtrooms lest they undermine the basic authority of district judges to control the proceedings before them," citing this Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam). The dissenting judges were particularly concerned about "the panel's willingness to second-guess the district judge's key factual findings, especially his findings that the District acted in bad faith and that lesser sanctions would not remedy the District's violation." *Id.*

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to restore the proper standard of appellate review of discovery sanctions established by this Court in *National Hockey League* and to resolve a split in the Circuits. Action by this Court to restore the properly deferential standard of appellate review is needed to reverse the erosion of the District Courts' ability to deal effectively with the continuing problem of discovery abuse.[1]

In *National Hockey League*, this Court recognized that the District Courts have the primary responsibility for controlling discovery and that their imposition of sanctions should be reversed only under the most compelling circumstances. In that case, the Third Circuit had reversed

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[1] *See* Dudley, *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. Rev. 189 (Winter 1992).

the imposition of a sanction of dismissal by the District Court on the grounds that the sanctioned behavior could be excused because of the level of burden on that party's counsel. This Court reversed, holding:

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing. . . . We think that the lenity evidenced in the opinion of the Court of Appeals, while certainly a significant factor in considering the imposition of sanctions under Rule 37, cannot be allowed to wholly supplant other and equally necessary considerations embodied in that Rule.

427 U.S. at 642 (citation omitted).

The Court of Appeals in this case has ignored the mandate of *National Hockey League* and far exceeded its proper role in reviewing the District Court's imposition of discovery sanctions. It has exceeded its role (1) by requiring that, before the District Court may impose substantial sanctions on a party that has already failed to comply with a discovery order, it must make specific findings that the party to be sanctioned acted in bad faith and would not be swayed by lesser sanctions and (2) improperly substituting its judgment for that of the District Court and failing to apply the properly deferential "clearly erroneous" standard of review to the District Court's factual findings. In fact, the Court of Appeals in this case has committed essentially the same error that led this Court to reverse the Third Circuit decision in *National Hockey League, i.e.*, excusing the sanctioned party because of the burden on the party's attorneys. *Compare* App. 20a *with* 427 U.S. at 641-42.

This decision is one of a series of decisions by the District of Columbia and other Circuits that have eroded the broad discretion vested in the District Courts to deter discovery abuse by imposing significant sanctions. Accord-

ingly, this Court should grant the writ and reverse the decision of the Court of Appeals.

I. THE COURT OF APPEALS EXCEEDED THE PROPER SCOPE OF APPELLATE REVIEW OF DISTRICT COURT ORDERS IMPOSING DISCOVERY SANCTIONS BY REQUIRING THE DISTRICT COURT TO FIND THAT THE DEPARTMENT ACTED IN BAD FAITH AND THAT LESSER SANCTIONS WOULD BE INEFFECTIVE.

In *National Hockey League*, this Court held that:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

427 U.S. at 642-43.

In this case, the D.C. Circuit has undermined the deterrence rationale for sanctions recognized in *National Hockey League* by requiring the District Courts, before imposing a sanction designed to deter the abuse of discovery, to make specific findings that the party's failure to comply with the discovery order was a result of bad faith and that no lesser sanction would be effective. App. 18a.

By imposing these requirements on the District Courts, the Court of Appeals has not only disregarded the mandate of this Court, but has improperly shifted the burden of persuasion concerning the sanction from the acknowledged violator to the District Court judge. These requirements undermine the ability of the District Courts to deter discovery abuse. The writ should be granted to restore the proper balance between the roles of the District Courts and the Courts of Appeals.

A. The Imposition of a Requirement to Find Bad Faith Is Inconsistent With Rule 37, This Court's Prior Decision, and Decisions of Other Circuits.

Neither Rule 37 nor any decision of this Court requires a finding of "bad faith" before a District Court may impose discovery sanctions even of the most severe variety. Rule 37(b)(2) provides that the District Court may make such orders as "are just" if a party fails to comply with a discovery order. The Rule thus gives the District Courts considerable discretion to impose sanctions and contains no requirement that the District Court make specific findings. Indeed, a prerequisite to any sanction under Rule 37(b) is that the party to be sanctioned has already failed to comply with an order of the District Court. Requiring the District Courts to make a further finding of bad faith before they can impose sanctions imposes an undue burden on the District Courts and undermines their ability to enforce their own orders, to the detriment not only of the litigants in that case, but of the judicial system as a whole.

While at least one other Circuit has adopted a similar requirement,[2] other Circuits have rejected the imposition of a bad faith requirement, holding that the sanctioned behavior need only be willful and thus not inadvertent. *See, e.g., Marrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1982), *Hyde & Drath v. Baker*, 24 F.3d

[2] *See, e.g., Mutual Federal Savings & Loan Ass'n v. Richards & Assocs.*, 872 F.2d 88, 92 (4th Cir. 1989).

1162, 1171 (9th Cir. 1992). Indeed, the Second Circuit has held that negligent failure to comply is sufficient to justify the imposition of a sanction. *See Cine Forty-Second Street Theatre Corp. v. Allied Artists Picture Corp.*, 602 F.2d 1062, 1066-68 (2d Cir. 1979).

In explaining its refusal to impose a bad faith requirement, the Second Circuit explained:

> [o]ur view advances the basic purposes of Rule 37, while respecting the demands of due process. The principal objective of the general deterrent policy of *National Hockey* is strict adherence to the "responsibilities counsel owe to the Court and to their opponents." . . . Negligent, no less than intentional, wrongs are fit subjects for general deterrence, *see* G. Calabresi, The Costs of Accidents, 133-173 (1970). And gross professional incompetence no less than deliberate tactical intransigence may be responsible for the interminable delays and costs that plague modern complex lawsuits. An undertaking on the scale of the large contemporary suit brooks none of the dilation, posturing, and harassment once expected in litigation. . . . The parties, and particularly their lawyers, must rise to the freedom granted by the Rules and cooperate in good faith both in question and response.

Id. at 1067 (citations omitted).

This case, which involves willful behavior on the part of the Department, demonstrates the pernicious results of imposing the bad faith requirement.[3] The Court of Ap-

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[3] The District of Columbia Circuit and other Circuits have eroded the deterrent function of Rule 37(b) by misinterpreting this Court's decision in *Societe International Pour Participations Industrielles Et Commercials v. Rogers*, 357 U.S. 197 (1958). In *Rogers* this Court held that a sanction imposed for actions over which a party had no control might be a due process violation. However, the District of Columbia Circuit has erroneously interpreted the *Rogers* decision to require a higher showing, including

peals reversed the sanction imposed by the District Court in large part because it believed that the Department's failure to comply with the discovery order was the result of excessive litigation burdens on the Department's attorneys, *i.e.*, the District of Columbia's Office of Corporation Counsel, despite the fact that the burden was the result both of the choices made by the Corporation Counsel's office in deciding how to staff the case and of the necessity to defend officers of the Department who were retaliating against the plaintiffs. App 20a-21a; District Court's Statement of Reasons on Remand at App. 72a-73a ("If the Department had not repeatedly violated the court's preliminary injunction, then its counsel would have had more time to devote to responding to Interrogatories"). This is exactly the reasoning engaged in by the Third Circuit that was rejected by this Court in *National Hockey League*. 427 U.S. at 641-43.

By reversing the District Court's decision because it believed that the discovery violation was not the result of bad faith, the Court of Appeals has validated a course of action in which (1) a litigant can devote too few resources to a case, (2) exacerbate the lack of resources by engaging in retaliatory conduct, the defense of which diverts resources that might otherwise have been available for discovery and trial preparation, (3) fail to meet its discovery obligations, and (4) avoid sanctions because its lack of resources precludes a finding of bad faith. This is the sort of litigation conduct that Rule 37(b) sanctions are intended to prevent. The decision below has effec-

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the bad faith requirement at issue in this case. As indicated by the Second Circuit in the language quoted above, the *Rogers* decision, properly interpreted, requires only that the sanctioned activity be one over which the party has some control. *See also Marrocco*, 966 F.2d at 224 ("sanctions may be appropriate where the noncomplying party acted *either* with willfulness, bad faith, *or* fault.") (emphasis in original). Review by this Court is necessary both to create uniformity on this important issue of federal law and to restore the appropriate remedial scope of Rule 37(b).

tively gutted this important authority conferred on the District Courts, and review by this Court is necessary to restore the effectiveness of Rule 37(b).

B. The Requirement That the District Court Demonstrate That Lesser Sanctions Would Be Ineffective Is Likewise Inconsistent With Rule 37, This Court's Prior Decision, and Decisions of Other Circuits.

The Court of Appeals also imposed a requirement that, before a District Court can impose a severe sanction, such as default or, in this case, a preclusion on calling non-expert witnesses, the District Court must find that no lesser sanction would be appropriate. This requirement undermines the effectiveness of Rule 37 sanctions as a means of deterring discovery abuse and has no basis in the Rule's language or this Court's *National Hockey League* decision.

First, as with the bad faith requirement, this requirement inappropriately shifts the burden to the District Court to justify the imposition of sanctions rather than compelling the party that has failed to comply with a discovery order to justify not imposing sanctions. Second, it needlessly protracts litigation by requiring the District Courts to give recalcitrant parties a "second chance." *See, e.g., United States v. BCCI Holdings (Luxembourg), S.A.*, 169 F.R.D. 220, 223 (D.D.C. 1996) (holding that, although the party's behavior justified default, under the precedent established by the D.C. Circuit in this case, the Court must attempt a lesser sanction).

Third, the subjective nature of such a determination reduces the ability of the District Courts to use sanctions to deter discovery abuse because it increases the possibility of reversal on appeal, with the result of negating a lengthy trial. This is, in fact, what happened in this case, where the District Court specifically found that, in light of the Department's prior failure to keep its promises to the Court and its repeated history of retaliation against

the plaintiffs, no lesser sanction would be effective. App. 66a-73a. Yet, the Court of Appeals reversed on its own *de novo* review of the record. App. 15a-18a; *see* Section II, *infra*.

As with the bad faith requirement, the imposition of the no lesser sanction requirement is inconsistent with the intent of Rule 37 and with this Court's *National Hockey League* decision. Although a similar rule has been adopted by some Circuits,[4] it has been explicitly rejected by at least one other Circuit. *Stafford v. Mesnick*, 63 F.3d 1445, 1450 (7th Cir. 1995); *United States v. DiMucci*, 879 F.2d 1488-94 (7th Cir. 1989). *See also Avionics Co. v. General Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1992) (no finding regarding lesser sanctions necessary if sanctioned action is willful or in bad faith). As with the bad faith requirement, this split hinges on the proper reading of this Court's *Rogers* opinion. *See* n.3, *supra*. That decision requires only that the sanctioned party have been able to comply, nothing more. Review by this Court is necessary to maintain uniformity of federal law and to restore the deterrent function of Rule 37(b).

II. THE COURT OF APPEALS EXCEEDED THE APPROPRIATE SCOPE OF APPELLATE REVIEW OF DISCOVERY SANCTIONS BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE DISTRICT COURT AND BY FAILING TO APPLY THE "CLEARLY ERRONEOUS" STANDARD TO THE DISTRICT COURT'S FINDINGS OF FACT.

Even if the District of Columbia Circuit precedent setting forth the requirements discussed above were correct, the Court of Appeals still exceeded the deferential scope

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[4] *See, e.g., EEOC v. General Dynamics Corp.*, 999 F.2d 113 (5th Cir. 1993); *Bass v. Jostens, Inc.*, 71 F.3d 237 (6th Cir. 1995); *Porter v. Martinez*, 941 F.2d 732 (9th Cir. 1991); *Mobley v. McCormick*, 40 F.3d 337 (10th Cir. 1994); *Wouters v. Marten County*, 9 F.3d 924 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 65 (1994).

of review for discovery sanctions established by this Court. In *National Hockey League,* this Court stated explicitly that the Courts of Appeals may not reverse the imposition of a sanction on the grounds that the appellate court, as an original matter, would not have imposed the sanction. 427 U.S. at 642-43. Similarly, the Courts of Appeals may not reverse if the factual findings upon which the sanction is based are supported by the record. Finally, the Courts of Appeals may not substitute their judgment for that of the District Courts by choosing to weigh "extenuating factors," such as burdens on counsel, more heavily than did the District Court. *Id.*

Yet, that is exactly what the Court of Appeals did in this case. It reversed the District Court, not because it found that the Court's findings of fact were clearly erroneous, but because it substituted its judgment for the District Court's in weighing the significance of the facts and in determining whether a lesser sanction would be effective. Specifically, the Court of Appeals exceeded the proper scope of review by holding that, despite the District Court's findings of bad faith on the part of the Department, the Department's behavior could be excused because of the burden on the Department's counsel. Thus, the decision of the Court of Appeals is directly contrary to this Court's decision in *National Hockey League.* 427 U.S. at 641-43.

Adherence to the mandates of *National Hockey League* is particularly important in this case because the Department's resource problems were largely self-inflicted. App. 72a-75a. First, the Department failed to commit adequate resources to properly manage this litigation. The District Court specifically raised this concern with the Department early in the litigation. App. 26a-28a. Second, the Department added to its burden by engaging in multiple acts of retaliation against the plaintiffs. These acts of retaliation resulted in two injunctive orders by the Court, several citations for contempt, and the incarceration of two Department employees. App. 66a-68a. A substantial amount of the time of the Department's lawyers

was engaged in discovery and hearings related to these acts of retaliation rather than the underlying claims.

By allowing the Department to use its alleged lack of resources as a shield to the sanction imposed by the District Court, the Court of Appeals effectively condoned a litigation tactic whereby a party subverts the judicial process by actively intimidating the other party or its witnesses and then claims it may disregard the Court's discovery orders because its resources are being consumed in litigation arising from these acts of retaliation. This is a disturbing precedent, made even more troubling by the fact that the Department is a public entity with a critical role in the administration of justice for the District of Columbia.

The Court of Appeals also exceeded the appropriate scope of review by rejecting the District Court's factual findings without finding them to be clearly erroneous as required by Fed. R. Civ. Proc. 52(a). *See Raab v. Amatex Corp.*, 769 F.2d 996, 1000 (4th Cir. 1985) (clearly erroneous standard applies to finding that plaintiff was at fault in disregarding pretrial discovery orders). This Court has held that, under this standard, the District Court's findings must be upheld if there is "evidence to support [that determination]" and the appellate court is not "on the entire evidence . . . left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). This standard is appropriate to review a finding of bad faith because of (1) "the superiority of the trial judge's position to make determinations of credibility" and (2) the principle that "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.* at 574. In making its decision in this case, however, the Court of Appeals not only failed to apply the "clearly erroneous" standard, but largely ignored the facts as found by the District Court.

As discussed in the Statement of the Case, the Department repeatedly failed to respond adequately to plaintiffs'

Interrogatory, and the Court accordingly imposed the sanction that had been threatened in its order compelling the Department to respond to the Interrogatory. Despite the District Court's signal that it would entertain a motion for reconsideration, the Department waited nearly a month, until only four days remained before the close of non-expert discovery, to make such a motion. In its motion, the Department offered both a new excuse for its previous failure to respond (*i.e.*, that it had not understood that the Interrogatory required it to identify individuals) and a list of 1000 names mechanically culled from all of the documents and deposition testimony in the case.

At the hearing on the motion for reconsideration, the Department raised yet another excuse, claiming for the first time that its failure to respond in a timely fashion was due to delay in its receipt of the November 2 order. Citing the Department's failure to raise this excuse on three previous occasions where its tardy response was at issue—*i.e.*, (1) its November 10 response to plaintiffs' Interrogatory, (2) the November 17 hearing on the Order, and (3) its December 12 motion for reconsideration—the District Court found that this assertion was not credible and that the Department had acted in bad faith. App. 70a-71a. Further, in light of the Department's behavior throughout the litigation and the ongoing acts of retaliation, the District Court held that no lesser sanction would be effective in ensuring future compliance of the Department with the Court's orders. Accordingly the District Court denied the motion for reconsideration.

In reversing, the Court of Appeals made no pretense that it was applying the "clearly erroneous" standard to these factual findings. Rather, the panel merely stated that "we are unconvinced" that the Department's belated explanation was made in bad faith and that it had not been "persuaded" that a lesser sanction would have been ineffective. App. 21a. The Court of Appeals failed to properly apply the deferential standard of review required both by Rule 52(a) and by this Court's decision in

National Hockey League. The Court of Appeals thus improperly arrogated to itself the proper role of the District Court as the finder of fact, a precedent that undermines the finality of District Court fact-finding. This Court should grant the writ to reverse this disturbing precedent.

CONCLUSION

To restore the proper standard of appellate review for the imposition of discovery sanctions, this Court should grant the writ and reverse the decision of the Court of Appeals.

Respectfully submitted,

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February, 1997

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 14, 1996 Decided August 23, 1996

No. 95-7207

SHARON BONDS, *et al.*,
Appellees

v.

DISTRICT OF COLUMBIA and
MARGARET A. MOORE,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 93cv02420)

Before: EDWARDS, *Chief Judge*, GINSBURG and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: This appeal involves a class-action suit brought by employees of the District of Columbia Department of Corrections ("Department"), alleging a pattern or practice of sexual harassment against women employees, both by creating a hostile working environment and by conditioning job benefits on the granting of sexual favors, and a pattern or practice of retaliation against employees opposing such sexual harassment. After sequential trials before a jury on liability and dam-

ages, the district court entered judgments against the District of Columbia ("District")[1] on behalf of the plaintiff class and of all the named plaintiffs but one. The district court also awarded equitable relief to the prevailing named plaintiffs and entered an order directing class-wide injunctive relief.[2]

The principal issue on appeal is whether the district court abused its discretion in precluding the District from offering any fact witnesses at trial as a discovery sanction under Rule of Civil Procedure 37(b)(2) and (d).[3] The District's sanctionable conduct was in failing to respond in a timely manner to an interrogatory requesting the names of all persons with knowledge of relevant events regarding the class action and then providing an inadequate response. In recognition of the fact that the choice of an appropriate sanction is necessarily a highly fact-based determination based on the course of the discovery process leading up to the sanction, we remanded the record after oral argument for the district court to explain why it did not adopt a lesser measure, such as precluding the District from calling any fact witnesses whom the plaintiffs had not deposed at the time of the discovery

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[1] The defendants-appellants are the District of Columbia and the present and former directors of the Department of Corrections, Margaret A. Moore and Walter B. Ridley, sued in their official capacities. For ease of reference, we refer to the defendants-appellants as "the District."

[2] By order of January 12, 1996, this court stayed implementation of the class-wide injunctive relief.

[3] In its Memorandum Opinion I, of August 9, 1995, the district court described its sanction as precluding the District "from calling non-party fact witnesses." The qualification of the order to *non-party* witnesses does not appear in the November 7, 1994 order, the court's statements at the November 17, 1994 discovery hearing, the court's November 18, 1994 order, the court's statements at the January 25, 1995, status conference, or the court's order on the motion for reconsideration of January 25, 1995, all of which refer to "all witnesses."

violation.[4] On remand, the district court explained that its more severe sanction was necessary not only for the purpose of deterrence but to avoid prejudice to the plaintiff's case and to the court's calendar, as well as to prevent a benefit to the District from its discovery violation. The record does not support these findings, however; nor does it show that the District acted in flagrant or egregious bad faith. Because the preclusion order denied the District its right to a trial on the merits, we conclude that the district court abused its discretion.[5] We reach this conclusion reluctantly because sexual harassment is a long-standing problem at the Department of Corrections, *see Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), which the current director acknowledges and which the district court found persists, and because the plaintiffs, who will bear the brunt of our decision, themselves suggested a more measured sanction to the district court.

I.

Consistent with the deference due to the district court in reviewing a discovery sanction imposed under Rule 37, our obligation is "not just to scrutinize the conclusion but to examine with care and respect the process that led up to it." *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1986), *cert. denied*, 484 U.S. 871 (1987). Hence, we set forth the pretrial proceedings in some detail.

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[4] Although in the absence of findings as to the potential effectiveness of a lesser sanction we could have reviewed the record independently, *see Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990), *cert. denied*, 498 U.S. 1101 (1991), we concluded that in light of the deferential standard of review a statement of reasons from the district court was advisable. *See Weisberg v. Webster*, 749 F.2d 864, 874 (D.C. Cir. 1984); *Von der Heydt v. Rogers*, 251 F.2d 17 (D.C. Cir. 1958) (per curiam).

[5] In light of our disposition, we do not reach the District's challenges to the dismissals of two jurors and the scope of the class-wide injunctive relief.

The plaintiffs' first amended complaint, filed January 5, 1994,[6] was in the form of a class-action suit for sexual harassment of current and former women employees at the D.C. Department of Corrections, as well as for retaliation against employees who opposed such harassment. The counts were for: (1) *quid pro quo* sexual harassment in violation of § 703 of the Civil Rights Act of 1964; (2) hostile-environment sexual harassment in violation of § 703 of the Civil Rights Act of 1964; (3) retaliation against the exercise of protected activities under § 704(a) of the Civil Rights Act of 1964; and (4) violation of plaintiffs' constitutional equal protection rights, actionable under 42 U.S.C. § 1983. Shortly before trial, the district court granted the plaintiffs' request to add a fifth count, a reprisal claim for violation of First Amendment rights, also brought under § 1983.

Soon after the complaint was filed, the district court was confronted with the problem of retaliatory conduct by Department employees against the named plaintiffs. On March 28, 1994, the court issued a temporary restraining order, followed on April 26 by a preliminary injunction, to prevent a retaliatory demotion of plaintiff Bessye Neal. On June 7, the court issued a second preliminary injunction barring proposed retaliatory disciplinary action against plaintiff Tyrone Posey and against Dennis Brummell, plaintiff Vera Brummell's husband and also a Department employee, and barring all future retaliation against any named plaintiff. After the issuance of the June 7 order, Department employees engaged in three further acts of retaliatory conduct: a retaliatory demotion of plaintiff Essie Jones; the failure to investigate a complaint of retaliatory harassment against plaintiff Shivawn Newsome; and a renewed retaliatory disciplinary action against plaintiff Tyrone Posey. After three days of hearings, the district court on December 16 held the

[6] The plaintiffs filed their initial complaint on November 24, 1993.

District of Columbia and the Department director in civil contempt of court. Specifically, the court found that the director had failed to advise Department employees of the court's anti-retaliation injunction. On December 21, 1994, after finding that the director was unable to ensure compliance with the June 7 preliminary injunction, the court appointed a special master to oversee any personnel actions relating to the named plaintiffs and Dennis Brummell. Finally, on April 5, 1995, having found that two Department employees had engaged in retaliatory conduct against one of the plaintiffs' witnesses at trial, the court held both employees in criminal contempt of court and sentenced them to ten days' imprisonment each.

The plaintiffs began discovery on January 25, 1994, by requesting the production of a vast array of documents. The District timely sought a number of continuances, which the district court granted, in order to comply with the discovery request and other aspects of the litigation. As early as April 8, 1994, plaintiffs' counsel informed the court of difficulties with the production of documents, and filed a motion to compel. By June 30, plaintiffs' counsel informed the court of difficulties in scheduling depositions on the issue of class certification because the Assistant Corporation Counsel assigned to the case was occupied with other matters. The court, which had previously expressed concern, on March 28 and April 26, that the case was not being adequately staffed by the District, admonished the Assistant Corporation Counsel about the understaffing of the case.[7] Problems with the

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[7] The district court stated:

> Well, that's why the government is going to end up losing this case, isn't it? If the government doesn't listen to one thing I tell them in this case, they're headed down a rocky road, I'll tell you, and I don't know how I can make it any plainer. I know I've made it plain to you. I don't know if you[r] superiors aren't listening to anything you're saying or what's happening over there. The dates [plaintiffs' counsel]

document production continued, and on September 15 the court ordered the District to complete the production.

The plaintiffs scheduled a large number of depositions from September through early December 1994. According to the plaintiffs, they took 66 total depositions, of which 49 were conducted by November 10, 1994 (32 relating to the merits and 17 relating to the incidents of retaliation); depositions were held on most days in October and early November. During this time, the District also moved to extend the time to respond to the plaintiffs' motion for class certification from September 6, 1994, to October 3, 1994, and, over the plaintiffs' opposition, the court granted the continuance.[8]

On September 29, 1994, the plaintiffs submitted their First Set of Interrogatories. Interrogatory No. 2 asked the District to "[i]dentify all persons who have knowledge of or evidence that concerns the matters set forth in paragraphs 23 through 251 of the First Amended Complaint and, for each such person, describe the matters concerning which such person has knowledge or evidence." The term "identify" was defined to "mean[] to give, to the extent known, the person's full name, present or last known address, and the present or last known place of employment." At a status conference on Octiber 6, 1994, after the plaintiffs gave notice of a deposition to ask for the identity of persons with knowledge of the allegations in the complaint, the District stated that it would respond to interrogatory No. 2 by October 24. On October 24, however, the District moved for a two-week enlargement

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notes for the deposition, you either show or don't show, but no protective order is going to be granted.

You just note your dates, Mr. Kaplan [plaintiffs' counsel]. If they [the District's counsel] don't show, you proceed without them. If the witnesses don't show, I'll hold them in contempt. That's the only way I can deal with the District of Columbia Government these days.

[8] The court certified the plaintiff class on December 23, 1994.

of time to respond, to November 7, 1994. The District singled out interrogatories No. 2 and 13 as "particularly time consuming." [9] The plaintiffs opposed the motion for enlargement of time, and in the alternative "request[ed] that the Court further order that the defendants be barred from calling at trial any witnesses whom they fail to identify in response to Interrogatory Number 2 on or before November 7, 1994, and who could have reasonably have been identified by that date." On November 2, 1994, the court granted the District's motion for a continuance and ordered that:

> defendants shall have up to and including November 7, 1994 to file their answers to plaintiffs' set of interrogatories; provided, however, any witness not identified in response to Inter[rogatory] 2 who could reasonably be identified by Nov. 7, 1994, may not be called at trial.

The District failed to reply to the plaintiffs' interrogatories by the November 7, 1994, deadline. Three days later, on November 10, the District submitted its answers, which included the following response to interrogatory No. 2:

> The identities of all persons known to defendants having knowledge of or evidence that concerns the matters set forth in paragraphs 23 through 251 are contained in the complaint itself, documents produced in discovery, and the deposition testimony of the numerous witnesses given in deposition or scheduled for deposition. Defendants will supplement this response if individuals, not identified in discovery documents or depositions become known to them.

The plaintiffs, in a status report filed November 15, 1994, objected that the District's response was "wholly inadequate" because it failed to identify any witness.

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[9] Interrogatory No. 13 requested the District to identify each person who received a job benefit in preference to one of the named plaintiffs.

> Accordingly, the plaintiffs request that, absent good cause shown, the defendants be limited at trial to call only witnesses whom the plaintiffs have deposed and to be limited in their examination to topics the plaintiffs have covered in deposition.

The District, in a status report filed on November 16, and at a discovery hearing on November 17, maintained that its response to interrogatory No. 2 complied with Rule 33(d) (then classified as Rule 33(c)), which allows a party served with an interrogatory to produce business records for the requesting party to examine. However, the district court found, by order of November 21, 1994, that the District had failed to comply with the interrogatory and ruled that the "failure to identify any witnesses, by name, in response to plaintiffs' Interrogatory 2, indicates that no witnesses may be called at trial unless defendants successfully move for reconsideration of the November 2, 1994 order." [10]

On December 12, 1994, the District moved for reconsideration. Accompanying the motion was a "supple-

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[10] At the status conference on November 17, 1994, the district court announced:

> Well, under the order I entered, then the defendant[s] cannot call any witnesses with that response; isn't that right?
>
> . . .
>
> And if they want to change my order, they're going to have to move to reconsider.
>
> . . .
>
> So this trial will be without any witnesses for the defendant[s] unless I modify or reconsider that order.
>
> . . .
>
> You don't need to compel anything there.
>
> . . .
>
> You've already won your whole case right there.

In its Statement of Reasons on Remand, the district court explained that its reference to "your whole case," viewed in context, was intended to refer only to plaintiffs' motion to compel, not the case on the merits.

mental response to Interrogatory No. 2," which consisted of 27 pages containing over 1,000 names with brief identifications. The supplemental response was prepared by having two paralegals, who each spent two full weeks, go through all the documents and deposition testimony and pull out the names of every person mentioned. The District asserted in its motion, filed by an Assistant Corporation Counsel, who had been assigned to replace the second Assistant who had resigned in November, that the good-faith production of over 1,000 names showed that the District had not violated the court's order willfully. At a discovery hearing on December 21, 1994, counsel also contended that the Assistant originally assigned to the case had not received the order of November 2, perhaps because a secretary accidentally stapled two documents together. Counsel further explained that the first Assistant had not been at the November 17, 1994, discovery hearing because of illness and that the second Assistant (who had since resigned) had had little knowledge of the discovery issues.

The district court denied the motion for reconsideration of the discovery sanction on January 25, 1995. The court explained:

> I repeatedly stressed to the defendants the importance of the defendants' proper staffing of this case because of the need for a prompt trial date. I want to cut off the repeated need for preliminary injunction hearings, and I want to stop the defendants' ongoing misconduct which I have repeatedly found through preliminary injunction hearings in this case, and it is not my intention to allow the defendants to escape the consequences of their dilatory actions in discovery by getting out from under my November 2nd very clear order that they identify those people by November 7th or suffer the pain of not being able to call fact witnesses at trial.
>
> Then action five weeks later in giving a thousand names was a perfect demonstration of how not to

> comply with my order, and I have no reason and will not reconsider my original order, and the defendants will not be able to call any fact witnesses at trial.

Following a pretrial conference on February 22, 1995, the court denied the District's request for a trial continuance of four to six weeks, and the trial began on March 1, 1995, as scheduled. The District submitted, for the record, proffers on more than fifty witnesses that it would have called at trial, were it not for the preclusion order. On August 9, 1995, the district court entered final judgment on the verdicts for the plaintiff class and all but one of the named plaintiffs, awarded equitable relief (back-pay and reinstatement) to all the prevailing named plaintiffs, and issued an order for class-wide injunctive relief. The District appeals these three orders.[11]

II.

Under Rule 37, the district court has broad discretion to impose sanctions for discovery violations. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) (per curiam). The District concedes that its failure to make an adequate response to interrogatory No. 2 was a violation of a discovery order and subject to sanctions under Rule 37. It protests only the extreme nature of the sanction imposed, which it contends was tantamount to a default judgment.

A.

Rule 37 authorizes the district court, in response to a "failure . . . to serve answers or objections to interrogatories," to "make such orders in regard to the failure as are just," including "prohibiting that party from introducing designated matters into evidence." FED. R. CIV.

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[11] Proceedings for the absent class members continued in the district court.

P. 37(b)(2)(B), (d). In reviewing the discovery sanction imposed by the district court, we " 'may reverse the trial court only if . . . its actions were clearly unreasonable, arbitrary or fanciful.' " *Hull v. Eaton*, 825 F.2d 448, 452 (D.C. Cir. 1987) (per curiam) (quoting *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984)). Although we bear in mind that the district court was closer to the course of the litigation, *Founding Church of Scientology*, 802 F.2d at 1457, we exercise appellate review to ensure that the district court did not abuse its discretion in imposing too severe a discovery sanction. *See Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123 (D.C. Cir. 1977) (dismissal under Rule 41(b)). We accept the district court's factual findings unless they are clearly erroneous. FED. R. CIV. P. 52(a).

The central requirement of Rule 37 is that "any sanction must be 'just,' " *Insurance Corp. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 707 (1982), which requires in cases involving severe sanctions that the district court consider whether lesser sanctions would be more appropriate for the particular violation. *See* 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2284, at 623 (2d ed. 1994) ("[J]ustice requires that the most drastic sanctions be reserved for flagrant cases."). The choice of sanction should be guided by the "concept of proportionality" between offense and sanction. *See Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1077 (D.C. Cir. 1986); *Butler v. Pearson*, 636 F.2d 526, 531 (D.C. Cir. 1980); *cf. Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). Particularly in the context of litigation-ending sanctions, we have insisted that " '[s]ince our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success' or would

obviously prove futile." [12] *Shea*, 795 F.2d at 1075 (quoting *Trakas v. Quality Brands, Inc.*, 759 F.2d 185, 186-87 (D.C. Cir. 1985)); *see also Automated Datatron, Inc. v. Woodcock*, 659 F.2d 1168, 1170 (D.C. Cir. 1981).

In determining whether a severe sanction is justified, the district court may consider the resulting prejudice to the other party, any prejudice to the judicial system, and the need to deter similar misconduct in the future. *See Shea*, 795 F.2d at 1074. Thus, we have stated that "[c]onsiderations relevant to ascertaining when dismissal, rather than a milder disciplinary measure, is warranted include the effect of a plaintiff's contumacious conduct on the court's docket, whether the plaintiff's behavior has prejudiced the defendant and whether deterrence is necessary to protect the integrity of the judicial system." *Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990). The district court's interest in deterrence is a legitimate one, "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League*, 427 U.S. at 643; *see also Weisberg*, 749 F.2d at 871. Yet, unlike sanctions "that are geared to remedying some prejudice," sanctions based only on principles of deterrence "call for careful evaluation to ensure that the proper individuals are being sanctioned (or deterred) and that the sanctions or deterrent measures are not overly harsh." *Shea*, 795 F.2d at 1077. Because "a sound discretion hardly comprehends a pointless exaction of retribution," *Jackson v. Washington Monthly*, 569 F.2d at 123, a discovery sanction imposed for its deterrent effect must be

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[12] The plaintiffs rely on *Founding Church of Scientology*, 802 F.2d at 1459 n.15, in which the court emphasized the importance of a prior warning of the sanction to be imposed. *Founding Church of Scientology* is distinguishable because the court concluded that no lesser sanction "held out any realistic promise" of inducing compliance with the court order. *Id.* at 1459.

calibrated to the gravity of the misconduct. *Cf. Shepherd*, 62 F.3d at 1478-79.

The broad preclusion order under review approaches a default judgment in its severity. Although the plaintiffs retained the burden of persuasion at trial, *see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993), resolution of the plaintiffs' sexual harassment and retaliation claims was likely to depend on the credibility of conflicting witnesses and the jury's evaluation of Department employees' motives. In a case so likely to turn on the testimony of fact witnesses, the district court's order precluding the District from calling any fact witnesses left the District with little ability to contest the plaintiff's claims. It is true that the District could still introduce documentary evidence and expert tesimony, counter-designate portions of deposition testimony introduced at trial, cross-examine the plaintiffs' witnesses, and make opening and closing arguments. Moreover, the jury found against one named plaintiff on both her claims, and two named plaintiffs prevailed on their Title VII claim but not on their § 1983 claim. Hence, the preclusion order did not operate with such assured effect as a default judgment. Nonetheless, the other evidentiary means open to the District lacked the force of live testimony by Department employees whom the named plaintiffs and other witnesses had accused of sexual harassment and retaliatory conduct. *See Christie v. Foremost Ins. Co.*, 785 F.2d 584, 586 (7th Cir. 1986) ("Employment discrimination cases in particular often involve 'sensitive and difficult' issues of fact. . . . The credibility of witnesses is often crucial."); *Weahkee v. Perry*, 587 F.2d 1256, 1266 (D.C. Cir. 1978). Accordingly, a discovery sanction that results in a one-sided trial, as the preclusion order under review did, is a severe one.

Before imposing a discovery sanction as severe as that under review, the district court should consider a less drastic sanction in light of the three factors set forth in

Bristol Petroleum.[13] *See Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988) ("Before the extreme sanction of preclusion may be used by the district court, a judge . . . must consider less drastic responses."). When a discovery sanction denies the defendant the right to a trial on the merits, the district court must either make a finding supported by the record that the more severe sanction is necessary to avoid prejudice to the plaintiffs or to the court's calendar or to prevent a benefit to the defendant, or—if the sanction is based only on deterring future discovery misconduct—the more severe sanction must be supported by a finding of flagrant or egregious misconduct by the defendant. In somewhat similar circumstances, this circuit has previously set aside an excessive discovery sanction when lesser measures were not considered. *Grochal v. Aeration Processes, Inc.*, 797 F.2d 1093, 1098-99 (D.C. Cir. 1986) (holding that the plaintiff's responses to several interrogatories concerning damages were not "so inadequate as to warrant exclusion of [plaintiff's] evidence of damages and, as a necessary consequence of such exclusion, dismissal of [plaintiff's] complaint").[14] The requirement to consider a lesser sanction was manifest in the instant case, given that the plaintiffs themselves in their status report of November 15, 1994, requested a lesser sanction, whereby the District would have been precluded from calling any witnesses at trial whom the plaintiffs had not already deposed or scheduled for deposition as of November 7, 1994.[15] Thus, the district court was obliged to consider whether the more severe sanction was necessary to further interests other than

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[13] Indeed, the district court did expressly consider the *Bristol Petroleum* factors in its Memorandum Opinion I of August 9, 1995, at 19-20.

[14] The *Grochal* opinion was later vacated as moot, 812 F.2d 745 (D.C. Cir. 1987), so it lacks precedential effect.

[15] The district court would also have been authorized to award the plaintiffs "reasonable expenses, including attorneys' fees, caused by" the District's discovery violation. FED. R. CIV. P. 37(b)(2).

deterrence, or if not, whether a less severe sanction would have been more proportionate to the nature of the District's discovery violation and its effects on the litigation.

B.

In its Memorandum Opinion I, of August 9, 1995, the district court found the District's contention that it had not received the November 2, 1994, order containing the threatened sanction factually unsupported and found that the District had no excuse for its failure to comply by the November 7, 1994, deadline. The court ruled that the District's non-specific response to interrogatory No. 2 on November 10, 1994, was inadequate and that the supplemental response of December 12, 1994, remained inadequate and thus was "further evidence of bad faith." The court also ruled that the preclusion order "was not tantamount to the entry of a default judgment" because the "[p]laintiffs were still required to prove liability by a preponderance of the evidence, their witnesses were subject to cross-examination, and defendants were permitted to call expert witnesses." Even if the factors relevant for a default judgment were considered, the district court found that the delay would have "jeopardiz[ed] the schedule of a seven-week-long trial" and "would have substantially prejudiced plaintiffs."

In its Statement of Reasons on Remand, the district court addressed the possibility of a lesser sanction, while emphasizing that its preclusion order should be viewed in the context of the District's repeated delays in discovery and the contumacious conduct of Department employees. The district court succinctly explained that "the purpose of the sanction in this case went beyond deterrence to include avoiding prejudice to plaintiffs, preventing defendants from benefitting from their misconduct, and avoiding burdensome changes to this Court's schedule." We examine the court's stated reasons with respect to these three concerns.

(1) *Prejudice to the court.* By November 1994, when the district court imposed the preclusion sanction, most of the discovery had been completed, with final depositions to be taken by December 16, 1994. The trial was scheduled to begin on March 1, 1995. There is nothing in the initial or supplemental findings to indicate that the lesser sanction proposed by the plaintiffs would have interfered with maintaining the firm trial date or otherwise interfered with the district court's docket.[16] The trial date of March 1, 1995, was not set until mid-October 1994, and with plaintiffs' lesser sanction there would have been no need to change it.

(2) *Prejudice to the plaintiffs.* The district court's Statement of Reasons on Remand states that the lesser sanction would have prejudiced plaintiffs in the following manner: "While barring defendants from calling witnesses not deposed would have addressed the prejudice to plaintiffs' ability to effectively cross-examine those witnesses, it would *not* have redressed in any way the prejudice caused plaintiffs by their own inability to call witnesses who may have been *helpful* to their case, but whose identities were not revealed by defendants." This finding of prejudice to the plaintiffs was not previously asserted by the plaintiffs, who stated at the November 17, 1994, status conference that interrogatory No. 2 sought "to have the District . . . identify those persons on whom [it] relied in denying the allegations of the complaint," so that the plaintiffs could "assess whether our discovery program can draw to a close with some confidence that we've covered the bulk of the people whom the District might call as witnesses." In their brief to this court, the plaintiffs similarly state that their purpose in propounding interrogatory No. 2 was to

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[16] The district court's finding that its calendar would have been jeopardized because the plaintiffs "would have been required to take numerous depositions" of persons listed in the District's supplemental response of December 12, 1994, is premised on the false understanding that the plaintiffs sought to identify potential plaintiffs' witnesses with interrogatory No. 2. *See infra.*

be able to prepare cross-examination of the witnesses whom the District most likely would call at trial. Appellees' Brief at 5, 17. The plaintiffs' proposed lesser sanction would have protected them from prejudice to their interest in preparing cross-examination of the District's witnesses just as well. Moreover, the new theory of prejudice to the plaintiffs is not supported by the record. The plaintiffs have not identified any potential witnesses of whom they were unaware as of November 7, 1994.[17] For these reasons, the district court has not shown that the lesser sanction would have failed to protect against prejudice to the plaintiffs.[18]

(3) *Benefit to the defendants.* The district court stated that a lesser sanction would have allowed the District to benefit from its discovery violation "by permitting [the District] to conceal the identities of witnesses whose knowledge or testimony could have been helpful to the plaintiffs." [19] As noted, this was never the plaintiffs' claim, and even at this late date there is nothing to indicate that any witness was concealed from the plaintiffs. The record does not show how the District could have benefitted from its discovery violation if it had been precluded

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[17] When the plaintiffs attempted to point out a specific instance of prejudice in their proposed findings submitted to the district court following the remand of the record, the District's reply noted that the plaintiffs had in fact received the information about the particular witness months earlier. The district court's Statement of Reasons on Remand dropped any reference to the plaintiffs' asserted example of prejudice, and noted no other example.

[18] Although prejudice to the opposite party may be presumed when the discovery offense causes unreasonable delay, *Shea*, 795 F.2d at 1075, we have already concluded that the District's discovery violation did not delay the trial date. *See supra.*

[19] The district court further stated that if the District was correct that the plaintiffs already knew who the District's witnesses would be, then the proposed lesser sanction "would have been no sanction whatsoever." This statement reveals the essentially punitive nature, unrelated to any effects from the discovery violation, of the decision to impose the more severe sanction.

from calling any witnesses at trial whom the plaintiffs had not already deposed or scheduled for deposition.

C.

Deterrence. Having concluded that the district court's findings of prejudice to the court and to the plaintiffs, as well as benefit to the District, are unsupported by the record, we are left with only the rationale of deterrence. The district court emphasized on remand that "[i]mposition of a lesser sanction on defendants than the sanction adopted by the court on November 17, 1994, would have failed to protect the integrity of this Court's authority." Referring to its November 2, 1994, order, the court explained that "[w]hen, as in this case, a party has been apprised that further non-compliance with discovery rules will be met with a specific sanction, it is incumbent upon the court to carry out that sanction."

Because a Rule 37 sanction resting on principles of deterrence alone must be proportional to the gravity of the misconduct, *see supra* Part II.A, we conclude upon reviewing the district court's findings concerning the discovery violation that the District's discovery violation was not flagrant or egregious. The district court found that the District's invocation of Rule 33(d) to authorize its vague response to interrogatory No. 2 on November 10, 1994, was evidence of "bad faith." Although an advisory committee note offers support for the ruling that the District's reliance on Rule 33(d) was misplaced, *see* FED. R. CIV. P. 33(c) advisory committee's note (1980 amendment) (stating that a reference to business records without specifying particular documents is "an abuse of the option"), the District's legal argument was not frivolous, given the absence of case law in this circuit, and hence does not necessarily show bad faith. The district court also found that the District's "shifting expalantions" for the failure to respond in a timely manner were evidence of bad faith. Yet the District explained to the district court that the discrepancies in its position arose from the

absence of the Assistant Corporation Counsel assigned to the discovery issues at the November 17, 1994, discovery hearing due to illness. Therefore, we are unconvinced that the District's contention at the December 21, 1994, discovery hearing that counsel had not received the November 2, 1994, order—which the district court found was factually unsupported—was made in bad faith. The district court found further that the supplemental response of December 12, 1994, which contained over one thousand names, was "not compiled in good faith." Again, the supplemental response may have been over-broad, but it does not follow that the District was not attempting in good faith to comply with an interrogatory requesting it to identify "all persons" with knowledge of the allegations in the multi-count class-action complaint.

The district court emphasized the context of "defendants['] conduct throughout 1994" as a backdrop to the imposition of the preclusion order. Certainly, the district court did not hesitate to exercise its contempt powers to halt the disobedience of court orders by Department employees. The Rule 37, sanction, however, is designed to be used against discovery misconduct; the findings of contempt are themselves the appropriate sanction for the retaliatory conduct by Department employees. Finally, the district court was concerned about the "defendants' prior pattern of delay, repeated requests for extensions, and tardy production of documents." The District's dilatory conduct of prior stages of the discovery process is indeed directly relevant to the choice of an appropriate sanction. Yet there is nothing in itself sanctionable about the District's requests for extensions of time, which the district court granted, to produce documents and to file papers opposing class certification, and there are no findings in the record as to the cause of the problems with document production. Accordingly, we conclude that the record does not demonstrate that the District's discovery violation was flagrant or egregious.

The District's discovery violation must also be evaluated in the context of the demands that the plaintiffs' discovery requests placed on defense counsel within a strict pre-trial schedule set by the district court. This is hardly a case that had dragged on for years, or a case in which there is evidence that delays were sought for tactical advantage. Rather, there was a lot going on, often simultaneously, in a relatively short period of time, whether it be discovery in the form of document production [20] or depositions, or contempt proceedings, mediation efforts, class certification, or trial preparation. The plaintiffs' interrogatories were served on September 21, 1994, and due on October 24; the discovery period was scheduled to close on December 16, 1994, and trial was set for March 1, 1995. During the period between September 21 and October 24, 1994, counsel for the District defended a Department employee in a contempt proceeding on September 30, and defended the Department director in a contempt proceeding on October 20; filed the District's opposition to the plaintiffs' motion for class certification on October 3; represented the District in court-ordered mediation beginning October 13; and defended Department employees in the 32 depositions that the plaintiffs scheduled for between October 12 and October 28.[21] Hardly a case where a party ignored an ongoing litigation, rather, the record reveals efforts to meet numerous deadlines within a tight time period in a complex class-action suit. Although some of the competing demands on defense counsel's time were occasioned by Department employees' contumacious conduct, as the district

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[20] According to the plaintiffs' brief, the District had produced over thirteen feet of documents by the time that the discovery violation occurred. Appellee's Brief at 6.

[21] The District's motions to stay the proceedings while the parties engaged in mediation and for a protective order against the taking of further depositions by the plaintiffs without leave of court were denied by the district court.

court found, the district court addressed the conduct independently. The district court acknowledged, moreover, that it was aware of the intense litigation demands generally imposed on the Office of the Corporation Counsel, in noting in its Memorandum Opinion I, at 14 n.3 (Aug. 9, 1995), the underfunding and understaffing in that Office as set forth in the Declaration of Michael E. Zielinski of June 19, 1995. This acknowledgment by the district court, combined with the intensity of the litigation activity related to this lawsuit alone, further support the conclusion that the District's discovery violation was not flagrant or egregious.

We recognize that the plaintiffs and the district court were beset by the District's discovery delays, and that while discovery was ongoing Department employees engaged in retaliatory conduct. These are serious matters, and we do not take them lightly. Indeed, the district court's frustration and exasperation is evident both in its demands that the District assign additional counsel to other demands on the Corporation Counsel, and in its declaration on remand that in the retaliatory conduct by Department employees and the discovery delays by the Corporation Counsel, "this court has witnessed the most shocking example of irresponsible conduct during [the judge's] tenure on the bench." Yet "nothing in the district court's opinions or the record . . . persuade[s] us that alternative sanctions, such as [the proposed lesser sanction], would have been ineffective." *Shepherd,* 62 F.3d at 1469. The discovery violation does not reflect either an attack on the integrity of the court or an attempt by the District to gain an unfair tactical advantage over its litigation opponent. There is no evidence that the District withheld anything in discovery. Contrary to the district court's findings, the record provides no evidence of prejudice to the plaintiffs or the court's calendar, nor of benefit to the District. It is true that the discovery violation occurred at a time when discovery

was well underway, with document production largely completed, most of the plaintiffs' depositions already scheduled, and a firm trial date set, and these circumstances constrained the nature of a "just" sanction under Rule 37. Nevertheless, to be punitive without regard to the substantial discovery that had occurred and was continuing, particularly given the district court's acknowledgment of other litigation burdens, would run afoul of the proportionality requirement and be overly harsh, and thus, unreasonable. In view of the nature of the District's discovery violation, principles of deterrence alone cannot support the broad preclusion order imposed. Accordingly, we are constrained to conclude, reluctantly, that the district court abused its discretion in not imposing a less harsh sanction, and we reverse and remand the case to the district court.[22]

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[22] Our disposition of this appeal does not disturb the district court's injunction barring retaliation at the Department, which the District does not challenge on appeal. This order was originally issued as a preliminary injunction barring retaliation against the named plaintiffs on June 7, 1994, which was extended to all the plaintiffs' witnesses on March 15, 1995, and issued as part of paragraph 1 of the permanent injunction affecting all Department employees on August 9, 1995.

[Filed Aug. 9, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-2420
(RCL)

BESSYE NEAL, *et al.*,
Plaintiffs,

v.

DIRECTOR, DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS, *et al.*,
Defendants.

MEMORANDUM OPINION I
(FINAL JUDGMENT ON JURY VERDICTS)

The court today issues this Memorandum Opinion I and accompanying order entering Final Judgment on Jury Verdicts. Included herein are more detailed findings of fact and conclusions of law regarding the court's discovery sanction against defendants. Separately issued today are the following opinions and accompanying orders: Memorandum Opinion II covering Equitable Relief for Individual Named Plaintiffs; Memorandum Opinion III covering Class Wide Injunctive Relief; and Memorandum Opinion IV covering Procedures for Absent Class Members.

I. BACKGROUND

This action arises under §§ 703 and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. The case was tried to a jury com-

mencing March 1, 1995; and the jury returned verdicts on April 4 and April 21, 1995.

Plaintiffs are seven current and former female employees of the Department of Corrections, and a former male employee. The eight named plaintiffs represent a class, certified by the court to consist of the following two-part membership: (a) All current and former female employees who have been employed by the Department of Corrections between April 1, 1989 and date of trial, and who were adversely affected by the practices of sexual harassment. (b) All current and former male and female employees who have been employed by the Department between April 4, 1991 and date of trial, and who have suffered retaliation for opposing such unlawful employment practices.

The District of Columbia Department of Corrections ("the Department") is an agency of the District of Columbia, employing over 4000 persons, approximately 1500 of whom are female. The Department operates seven prisons in Lorton, Virginia, and two facilities in the District, in addition to several smaller community correctional centers in the District. The Lorton facilities are Maximum, Medium, Minimum, Central, Modular, Occoquan and Youth Center. The D.C. facilities are the Central Detention Facility (CDF or "the D.C. Jail") and the Correctional Treatment Facility (CTF). Each institution is headed by a Warden (formerly an Administrator). All of the facilities and their employees are under the supervision of the Director of the Department, who was Walter B. Ridley at the time this case was filed, but who has since been succeeded by Margaret A. Moore. The Director is appointed by the Mayor of the District of Columbia, is a member of the Mayor's cabinet, and reports directly to the City Administrator and the Mayor. The Director is assisted by a Deputy Director and four Associate Directors, one for each service area of the Depart-

ment: Administration, Operations, Institutions and Programs. The titles of these officials were recently changed to Executive Deputy Director and four Deputy Directors.

A brief summary of the complaint follows:

Plaintiffs alleged injuries due to a pattern and practice of sexual harassment committed by the Department against its current and former female employees, and a pattern and practice of retaliation against current and former male and female employees who opposed or complained of sexual harassment. Specifically, plaintiffs contended that the Department was culpable as to four categories of unlawful behavior: (1) Quid pro quo sexual harassment. Supervisors demanded that female employees submit to sexual advances as a condition of job benefits or to avoid adverse job actions. (2) Sexual favoritism. Supervisors favored women who acceded to sexual overtures by offering them job benefits and opportunities, to the detriment of women who rejected those overtures. (3) Hostile environment. Supervisors and co-workers regularly engaged in offensive conduct of a sexual nature and women were treated less favorably than comparably situated men. (4) Retaliation. Employees who complained about the hostile environment, or aided and abetted complaints of sexual harassment made by others, were treated less favorably than they would otherwise have been treated.

As a consequence of sexual harassment and retaliation, plaintiffs claimed severe emotional distress and loss of wages and other benefits. They sought back pay, other job benefits, and compensatory damages to redress their injuries. In addition, plaintiffs sought a declaration that unlawful practices exist at the Department of Corrections, a permanent injunction prohibiting the Department and its agents from perpetuating these practices, and a mandate that the Department conform with Title VII. Lastly, plaintiffs asked for attorneys' fees and costs.

To date, the litigation has included two successive trials before the same jury, followed by a non-jury trial.

The first jury trial addressed only common issues related to class liability. The second jury trial addressed legal damages (i.e., medical expenses; pain and suffering) for the named plaintiffs. The non-jury trial addressed equitable remedies (i.e., back pay; front pay; job reinstatement; promotions; injunctive relief) for the named plaintiffs. Later proceedings will address liability and remedies as to absent class members.

II. DISCOVERY SANCTION

On November 21, 1994, this court sanctioned defendants for failing to respond to an interrogatory. The interrogatory had requested names of persons with knowledge of allegations in the complaint, and a summary of the knowledge each person had. For their abuse of the discovery process, defendants were barred from calling non-party fact witnesses. After full briefing by the parties, on Januray 25, 1995, the court denied the defendants' motion for reconsideration. The court now sets forth its findings of fact and conclusions of law on the basis of which it issued the sanction, and subsequently denied the defendants' request for reconsideration.

A. Findings of Fact

1. This was an extraordinary case because the defendants repeatedly committed acts of retaliation against the class agents while the case was pending. It was therefore necessary to proceed promptly to trial so that plaintiffs' claims could be fully ventilated. Should their claims prove meritorious, plaintiffs could obtain permanent protection from the court. The court advised the parties repeatedly that it would bring the case to trial at the earliest possible time, and that the parties should staff the case accordingly.
2. Defendants were admonished by the court on several occasions that they could not expect to be granted unlimited extensions of time, and that they must comply with the deadlines set by the court.

a. On March 28, 1994 the court suggested that counsel for the defendants speak to her supervisor about augmenting the staffing of this case. She was cautioned that staffing deficiencies would not be permitted to stall the progress of the litigation.

b. On April 26, 1994 the court inquired whether Ms. Burroughs had spoken to her supervisor about staffing; she indicated that she had. In conference with counsel for the parties after the status conference, the court re-emphasized that Corporation Counsel must properly staff the case, which required involvement of more than the single lawyer then assigned.

c. On June 30, 1994 the following exchange transpired:

MS. BURROUGHS: The government is going to have another attorney enter his appearance shortly in this case, but he already has a fairly booked schedule. We have an extremely—

THE COURT: Well, then, why bother?

MS. BURROUGHS: Well—

THE COURT: Why don't you get somebody that has a schdule that can comply with the expedited discovery that I've ordered in this case because this case is going to trial very shortly?

MS. BURROUGHS: Your Honor, there has been no change in the government's resources since this case was filed.

THE COURT: Well, that's why the government is going to end up losing this case, isn't it? If the government doesn't listen to one thing I tell them in this case, they're headed down a rocky road, I'll tell you, and I don't know how I

> can make it any plainer. I know I've made it plain to you. I don't know if your supervisors aren't listening to anything you're saying or what's happening over there. The dates he notes for deposition, you either show or don't show, but no protective order is going to be granted. You just note your dates, Mr. Kaplan. If they don't show, you proceed without them.

Transcript at 5.

d. At an October 17, 1994 meeting in chambers with counsel, Ms. Burroughs again claimed insufficient time to complete depositions. The court warned: "I told your boss to take you off other cases. As long as the Department does this retaliatory conduct you have to expect to work full time on this."

3. On September 21, 1994 plaintiffs served their first set of interrogatories upon defendants, including Interrogatory 2:

> Identify all persons who have knowledge of or evidence that concerns the matters set forth in paragraphs 23 through 251 of the First Amended Complaint and, for each such person, describe the matters concerning which such person has knowledge or evidence.

4. On September 20, 1994 plaintiffs served notice to take a deposition under Rule 30(b)(6) on October 4 to inquire into a similar, though not identical area. Defendants objected to the 30(b)(6) deposition. At a status conference on October 6, 1994, in open court, defendants gave assurances that they would make a timely response to Interrogatory 2 on October 24. Plaintiffs then withdrew the notice of deposition, expressly stating their reliance on defendants' representations.

5. On October 24, 1994, the date on which the responses were due, the defendants filed a motion requesting an enlargement of time until November 7, 1994. Plaintiffs did not oppose this extension, but in a response filed October 28, 1994, requested that the court condition the grant of additional time upon a ruling that, absent good cause shown, defendants be precluded from calling at trial any witnesses not identified by November 7th. The court issued such an order on Wednesday, November 2, 1994.

6. Defendants belatedly argue, in their proposed findings on the discovery sanction, that the November 7, 1994 cutoff set by the court was unnecessarily restrictive given that trial was not to commence for nearly four months. This contention, whether or not valid, is untimely. It should of course have been raised prior to the establishment of the November 7 date, or at worst, in defendants' motion to reconsider the discovery sanction. However restrictive the November 7 deadline, defendants had more than ample notice. Moreover, they were granted two extra weeks to comply—beyond the 30-day period for interrogatory responses specified in Fed. R. Civ. P. 33(b)(3), and beyond the October 24 date the defendants had assured the court at the October 6 status conference that they would meet.

7. Defendants also object that the November 2 order setting the cutoff was not received by defendants until November 7, the same day as the deadline. This is a spurious argument given the repeated warnings. Indeed, it was defendants' own motion of October 24, 1994, the original cutoff date, that requested an enlargement until November 7. And even if the order was not received until November 7, its content and cutoff were known by defendants in advance. It is this court's standard practice to notify the parties in person or by telephone when an order specifies an

imminent deadline. The court is confident that its standard practice was followed in this instance. Defendants would have been told that the order was signed on November 2 and was available for immediate pickup at the Clerk's office if defendants did not wish to await the mail. It is quite telling that defendants do not say they didn't know about the order on November 2; they just say they didn't receive it until November 7. Indeed, they fail to acknowledge that the plaintiffs had suggested the court add the condition to the November 2 order when they filed their papers on October 28.

8. The close of fact discovery was ultimately set for December 16, 1994.[1]

9. By waiting until after discovery had been ongoing for some time and after the class representatives had been deposed, the plaintiffs could reasonably have expected defendants to have collected the information sought by the interrogatory.

10. Defendants did not request a further enlargement of time or any other relief from the November 2 order. However, their response to plaintiffs' interrogatory, even after the enlargement of time was granted, was served on November 10, not November 7 as the court ordered.

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[1] Discovery had been scheduled to close on October 28, 1994. It was extended to December 16. Then, due to contempt hearings held on December 15 and 16, the court allowed some depositions planned for that week to be rescheduled between January 1 and January 13, 1995. Defendants complain that their response to Interrogatory No. 2 was not due until October 24, 1994, only four days prior to the original discovery cutoff. On this timetable, there would have been insufficient time for plaintiffs to notice and conduct depositions. Considering the extension of the discovery cutoff, this grievance is not persuasive. Furthermore, defendants' alleged concern over plaintiffs' difficulty in scheduling depositions cannot justify untimely response to plaintiffs' interrogatories.

11. The defendants' response to Interrogatory No. 2, in its entirety, was as follows:

> The identities of all persons known to defendants having knowledge of or evidence that concerns the matters set forth in paragraphs 23 through 251 are contained in the complaint itself, documents produced in discovery, and the deposition testimony of the numerous witnesses given in deposition or scheduled for deposition. Defendants will supplement this response if individuals, not identified in discovery documents or depositions, become known to them.

12. No objection was asserted to Interrogatory No. 2. Now, in their proposed findings on the discovery sanction, defendants protest as follows: Because Interrogatory No. 2 pertained to paragraphs 23 through 251 of the Amended Complaint, it was actually 229 separate interrogatories rolled into one—delayed for tactical reasons until just before close of discovery. The court observes that deefndants may not proffer new objections under the guise of proposed findings. Moreover, as previously noted, defendants received a two-week grace period within which to respond to Interrogatory No. 2. The interrogatory was served on September 24, 1994; a response was finally due 44 days later on November 7. But for the court's dispensation, Rule 33(b)(3) would have been less generous. It states: "The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories."

13. Defendants' response did not identify a single witness. At a status conference on November 17, the court addressed the defendants' inadequate response to this and other interrogatories. Defendants insisted that their answer was fully responsive and that if they

had withheld the identification of any witnesses, it was because they sought to protect work product. No objection based on work-product privilege was asserted in the response. In any event, the interrogatory did not seek work product.

14. After argument, the court ordered that, pursuant to the November 2 order, and absent a successful motion for reconsideration, defendants were barred from calling any non-party fact witnesses at trial.

15. Several weeks later, on December 12, 1995, four days prior to the close of the discovery period (other than for experts), defendants filed a motion for reconsideration, and served plaintiffs with a supplemental answer to Interrogatory 2, listing approximately 1000 names.

16. In addition to being unacceptably tardy, the supplemental response was both over-inclusive and under-inclusive of the information that was sought by the discovery request.

17. The discovery was under-inclusive because, for many of the persons identified on the list, it failed to contain important identifying information requested by the interrogatory. There were, for example, no addresses and telephone numbers supplied for any of the persons identified in the response. For approximately 60 names, the defendants failed to offer *any* identification. Even where some information was furnished, there was no indication in many cases of the part of the complaint to which the person's knowledge related.

18. The supplemental response was also inexcusably over-inclusive. The list included at least two persons who were deceased, several persons who were identified simply as "time and attendance officer," "shop steward," or "elevator operator." Former supervisors

from previous employers of non-party witnesses were also included on the list.

19. In defendants' December 12, 1994 motion for reconsideration, they argued that: (a) it was not possible to have completed the work involved in compiling a list of names on time; and (b) they were unaware (although they do not state how they *could* be unaware) that they had to identify persons by name.

20. At the subsequent hearing on their motion, the District argued a completely different theory. For the first time, defendants claimed to have overlooked the court's November 2 order addressing the possible ban on witnesses. That new excuse for their failure to comply with the discovery request was inconsistent with their prior explanation, thereby casting doubt on counsel's credibility on this issue.

21. At the hearing, the District explained that the names were collected by paralegals who mechanically culled through the transcripts of depositions and other discovery documents. No judgment was exercised by counsel, despite the contrary requirement of Rule 26, in preparing the supplemental response.

22. The defendants failed to explain why they could not have furnished this information earlier, in a timely response to the discovery request. At the time the list of 1000 names was produced, four days remained in the period allotted for discovery. The defendants' ploy, if tolerated, would have required a substantial delay in the trial in this action, exposing the class agents to more months during which they could be at risk of retaliation by the defendants.

23. On January 25, 1995, in denying defendants' motion for reconsideration, the court explained:

> I repeatedly stressed to the defendants the importance of the defendants' proper staffing of this case because of the need for a prompt trial

> date. I want to cut off the repeated need for preliminary injunction hearings, and I want to stop the defendants' ongoing misconduct which I have repeatedly found through preliminary injunction hearings in this case, and it is not my intention to allow the defendants to escape the consequences of their dilatory actions in discovery by getting out from under my November 2nd very clear order that they identify those people by November 7th or suffer the pain of not being able to call fact witnesses at trial.
>
> Their action five weeks later in giving a thousand names was a perfect demonstration of how not to comply with my order . . . .

Transcript at 3-4.

24. In its order of February 22, 1985, in refusing to postpone the trial, the court further elaborated:

> Defendants' oral motion at the pretrial conference for a continuance of the trial is denied. The court has repeatedly advised defendants that this is a firm trial date because of ongoing retaliation against plaintiffs that has caused the court to issue various preliminary injunction and contempt orders. The court has repeatedly advised defendants that they were not staffing this case properly in terms of counsel and deadlines being ignored. All of the court's entreaties have apparently fallen on deaf ears as this court has witnessed the most shocking example of irresponsible conduct during its tenure on the bench.

25. According to defendants, any shortfall in staffing this case was not attributable to irresponsibility, but rather to limited resources and competing demands—especially in light of the extraordinary discovery

that the court permitted.[2] Defendants are critical of the penalties levied against them for not having the resources to keep pace.[3] It is, however, notable that this case was originally filed on November 24, 1993—more than 15 months prior to start of trial. Plaintiffs filed their motion for class certification on July 19, 1994—about 7½ months prior to start of trial. The breadth and depth of this litigation should have been obvious to the Department from the outset. Defendants' querulous lament over the scope of discovery is at best disingenuous.

26. The court's findings today deal exhaustively with the warnings the District received and the leeway it was granted. The court has not counted how many extensions of time were granted to defendants, but ultimately a court has to have discretion to set some deadlines and enforce them. Government defendants cannot place themselves above the law and make themselves unaccountable for their conduct because they are too busy to meet judicial deadlines. Whatever priorities the District has elected to establish for dealing with this type of litigation, it will have to endure the repercussions. Plaintiffs cannot be held responsible for the city's financial plight, understaffing, mismanagement, or other assorted prob-

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[2] Local Rule 207(b) *presumptively* limits discovery to 25 interrogatories and ten depositions. In this instance, plaintiffs were authorized to seek more than the presumptive deposition limit.

[3] Defendants attached to their papers on the discovery sanction, a declaration from Michael Zielinski, Assistant Deputy Corporation Counsel. It was intended to substantiate defendants' assertion of limited resources and competing demands. Plaintiffs moved to strike the declaration, and the proposed findings to which it pertains, because it was not made part of the record at the time the court considered this matter. The court has granted plaintiffs' motion in a separate order. Still, defendants' protestation of excessive burden and insufficient resources was well-known to the court. The Zielinski declaration would have added specificity, but would not have altered the court's conclusions.

lems—especially since the pace of this lawsuit was driven by defendants' recurring retaliation against class representatives.

27. There were, to be sure, burdens imposed upon defendants' counsel; but they were self-inflicted—traceable to misallocation and under-allocation of legal resources. Moreover, staffing problems were exacerbated by the Department's preoccupation with opposing preliminary injunctions and rationalizing contumacious acts of its employees. Distraction by these peripheral issues, rather than full attentiveness to discovery, goes a long way toward explaining counsel's inability to meet the discovery deadlines imposed by the court in this case.

B. Conclusions of Law

Defendants were forewarned of the consequences of their failure to comply with the discovery request, but nonetheless failed to reply responsively. The defendants refused to name even a single person in response to the interrogatory and failed to interpose any objection thereto. Having opted not to identify any persons, defendants must abide by the consequences of their decision.

It is no excuse that the District of Columbia may have denied its Corporation Counsel the wherewithal to properly defend this lawsuit. The Ninth Circuit, for example, upholding a district court order precluding the government from introducing any evidence on the issue of damages, acknowledged that counsel's failure to provide timely answers to interrogatories was probably the result of serious understaffing. *United States v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365, 1370 (9th Cir. 1980). Still, the court concluded that only severe sanctions would deter flagrant disobedience and callous disregard of court orders. *Id.* Indeed, "if the cause of the government's failures to comply with court orders is understaffing, then perhaps harsh measures will encourage those

charged with funding and allocating personnel among the Justice Department's various offices to take ameliorating action." *Id.*

Defendants' initial response to Interrogatory 2 was clearly inadequate, as the court found at the status conference on November 17. No witnesses were identified by name. Instead, the defendants simply referred to the more than 60 depositions taken at that time, the additional 51 or so depositions that had been noticed for deposition but not yet taken, and the six or seven file drawers full of documents produced by defendants to date.

It is well established that a party may not respond to an interrogatory seeking the identity of specific persons with a general reference to all documents produced in the case. *Monroe v. Ridley*, 135 F.R.D. 1, 3-4 (D.D.C. 1990) (referring to two-inch stack of documents without specifying which papers contained relevant information was not adequate response to interrogatory requesting that defendant identify persons who counselled plaintiff or discussed termination). Defendants' inadequate response was not merely a failure to respond to plaintiffs' request for discovery, but a clear failure to obey an explicit order of this court.

The supplemental response filed by defendants was further evidence of bad faith. As described above, the list of over 1000 names was mechanically culled from all documents and was vastly over-inclusive. At the same time, the response failed to identify the matters concerning which each person had knowledge.

The sanction imposed here was appropriate to the circumstances surrounding the defendants' infraction and well within the broad discretion which Rule 37 of the Federal Rules of Civil Procedure has entrusted to this court. In fact, Rules 37 (b)(2) & 37(d) contemplate the very misconduct in which the defendants have engaged. In pertinent part, these Rules provide:

> If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (A) An order that . . . designated facts shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order;
> >
> > (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
> >
> > (C) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
> >
> > . . . .

Fed. R. Civ. P. 37(b)(2)

> If a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Fed. R. Civ. P. 37(d).

Here, the defendants' infraction is twofold. First, they failed to provide an appropriate response to Interrogatory 2, in violation of Rule 37(d), for which a sanction is warranted. Second, and more troubling, defendants failed to comply with the court's order directing them to furnish a full response to the Interrogatory by November 7, 1994, thus violating Rule 37 (b)(2). Rule 37(b)(2)(B) con-

templates the very sanction imposed here by explicitly authorizing the court to preclude the disobedient party from supporting or opposing designated claims or defense, or from introducting designated matters in evidence. Accordingly, the court's sanction is well within the authority granted by the Federal Rules of Civil Procedure.

The selection of a sanction, moreover, is entrusted to the broad discretion of the court. *Hull v. Eaton Corp.*, 825 F.2d 448, 452 (D.C. Cir. 1987). This court has imposed more severe sanctions for similar misconduct. *See, e.g., Monroe,* 135 F.R.D. at 4, (default judgment may be appropriate sanction for serious discovery abuses); *Center on Corporate Responsibility, Inc. v. Shultz,* 368 F. Supp. 863, 873 (D.D.C. 1973) (certain allegations of the complaint were deemed established where defendants failed to comply with discovery orders); *Hull,* 825 F.2d at 451-52 (extreme sanction of dismissal may be within the trial court's discretion).

The court here did not impose the most severe sanction. The sanction was not tantamount to the entry of a default judgment. Plaintiffs were still required to prove liability by a preponderance of the evidence, their witnesses were subject to cross-examination, and defendants were permitted to call expert witnesses. Such participation at trial cannot be equated to default judgment. Nonetheless, the factors identified in *Monroe* to support the entry of a default judgment *a fortiori* support the milder sanction in this case. The court in *Monroe,* 135 F.R.D. at 5, quoting *Bristol Petroleum Corp v. Harris,* 901 F.2d 165, 167 (D.C. Cir. 1990), established three factors to consider:

> the effect of [the party's] dilatory or contumacious conduct on the court's docket, whether the [party's] behavior has prejudiced the [opposing party], and whether deterrence is necessary to protect the integrity of the judicial system.

Defendants' delay and inadequate response required the court's attention. If the court had reconsidered the

sanction, plaintiffs would have been forced to take additional discovery, thus jeopardizing the schedule of a seven-week-long trial.

The defendants' conduct, if left unpunished, would have substantially prejudiced plaintiffs. Essentially plaintiffs would have been required to determine which of 1000 persons actually had knowledge of the allegations, then seek permission of the court to extend the discovery period in order to depose anticipated witnesses. Moreover, delay of the trial would have postponed relief for the victims of sexual harassment and retaliation, and perpetuated the underlying causal conditions. As an alternative, plaintiffs could have proceeded to trial as scheduled, unprepared to examinue many of defendants' witnesses. The plaintiffs should not be made to confront this Hobson's choice as a result of the defendants' misconduct.

Finally, the sanction was justified to deter such conduct in the future—a need that this court recognized as particularly evident when the disobedient party is a government entity. *Monroe*, 135 F.R.D. at 7.

III. JURY VERDICTS

In the liability phase of the trial, the jury found that plaintiffs had established, by a preponderance of the evidence, that defendants had engaged in a pattern and practice of quid pro quo sexual harassment, hostile environment sexual harassment, and retaliation in violation of Title VII and 42 U.S.C. § 1983. Specifically, the jury unanimously answered "yes" to the following questions: (1) Do you find that the Department of Corrections engaged in a pattern and practice of sexual harassment by creating a sexually hostile working environment for female employees? (2) Do you find that the Department of Corrections engaged in a pattern and practice of sexual harassment by making or threatening to make job benefits for women conditioned upon the granting of sexual favors? (3) Do you find that the Department of Corrections

engaged in a pattern and practice of retaliation against employees who challenged or complained of sexual harassment or who assisted others in challenging sexual harassment?

In the damages phase of the trial, the same jury made determinations in favor of six individual plaintiffs on their Title VII claims. With respect to Vera Brummell, Barbara Carter, Bessye Neal, Shivawn Newsome, Tyrone Posey and Teresa Washington, the jury answered the following question in the affirmative: Do you find that defendants' pattern or practice of sexual harassment and/or retaliation [4] in violation of Title VII of the Civil Rights Act of 1964 adversely affected plaintiff [name]? [5]

In order to have answered the Title VII question affirmatively, the jury was instructed to find, for each individual, one of the following: (a) that advances of a sexual nature were made to her and were unwelcome; (b) that she found the sexually hostile environment personally offensive, and that a reasonable person would find the environment offensive; or (c) that the pattern or practice of retaliation played a role in any action or threat of action taken against him or her, or any changes in his or her job conditions.

The jury's first verdict thus establishes liability of the Department of Corrections for a pattern or practice of sexual harassment and/or retaliation. The second verdict establishes that such pattern or practice had an adverse effect on six of the plaintiffs—Brummell, Carter, Neal, Newsome, Posey and Washington. Plaintiff Essie Jones' allegations involved sexual favoritism; but the jury found, under both Title VII and section 1983, that sexual favoritism did not disadvantage Jones in the terms and con-

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[4] In the cases of plaintiffs Neal and Posey, the question was limited to retaliation; neither plaintiff alleged sexual harassment.

[5] The jury answered in the negative as to adverse effect under section 1983 for plaintiffs Posey and Washington.

ditions of her employment. The jury was not asked to render a verdict on plaintiff Sharon Bonds; her claims pre-dated the cutoff for legal remedies under either Title VII or section 1983.

Having made an express determination that there is no just reason for delay, the court, pursuant to Fed. R. Civ. P. 54(b), will enter FINAL JUDGMENT ON THE JURY VERDICTS as to defendants' liability to the plaintiff class, and as to defendants' liability for legal damages to the individual named plaintiffs. A separate order shall issue this date.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: Aug. 9, 1995

[Filed Aug. 9, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-2420
(RCL)

BESSYE NEAL, *et al.*,
Plaintiffs,
v.

DIRECTOR, DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS, *et al.*,
Defendants.

FINAL JUDGMENT AND ORDER I
(FINAL JUDGMENT ON JURY VERDICTS)

This case was tried to a jury commencing March 1, 1995; and the jury returned verdicts on April 4 and April 21, 1995. Based upon those verdicts, and for the reasons more fully set forth in accompanying Memorandum Opinion I, the court hereby enters final judgment on the issues tried to the jury.

As to defendants' liability to the plaintiff class under Title VII of the Civil Rights Act of 1964, the court hereby enters the following judgment based upon the jury's verdict: (1) The Department of Corrections engaged in a pattern and practice of sexual harassment by creating a sexually hostile working environment for female employees. (2) The Department engaged in a pattern and practice of sexual harassment by making or threatening to make job benefits for women conditioned upon the granting of sexual favors. (3) The Department engaged in a pattern and practice of retaliation against employees who challenged or complained of sexual harassment or who assisted others in challenging sexual harassment.

As to defendants' liability to the plaintiff class under 42 U.S.C. § 1983, the court hereby enters the following judgment based upon the jury's verdict: (1) Sexual harassment of women by male supervisors and co-workers is the custom or unwritten policy of the Department. (2) The Director or other high ranking officials of the Department knew of this custom or unwritten policy of sexual harassment and went along with it by affirmatively supporting it or showing deliberate indifference in failing to take adequate measures to stop it. (3) Retaliation against employees who challenged or complained of sexual harassment or who assisted others in challenging sexual harassment was the custom or unwritten policy of the Department. (4) The Director or other high ranking officials of the Department knew of this custom or unwritten policy of retaliation and went along with it by affirmatively supporting it or showing deliberate indifference in failing to take adequate measures to stop it.

As to defendants' liability for damages to the individual named plaintiffs, the court hereby enters the following judgment based upon the jury's verdict: (1) Vera Brummell was adversely affected by defendants' pattern or practice of sexual harassment and/or retaliation, and by defendants' custom or usage of sexual harassment or retaliation; she is hereby awarded $500,000.[1] (2) Barbara Carter was adversely affected by defendants' pattern or practice of sexual harassment and/or retaliation, and by defendants' custom or usage of sexual harassment or retaliation; she is hereby awarded $200,000. (3) Defendants did not engage in sexual favoritism which disadvantaged Essie Jones in the terms and conditions of her employment, and her claims are hereby dismissed. (4) Bessye Neal was adversely affected by defendants' pattern

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[1] Under § 102 of the 1991 Amendments to Title VII of the Civil Rights Act of 1964, compensatory damages are capped at $300,000. No such cap exists under 42 U.S.C. § 1983. Because the jury held that Brummell and Neal were adversely affected under both statutes, there is a lawful basis upon which they can each be awarded $500,000.

or practice of retaliation, and by defendants' custom or usage of retaliation; she is hereby awarded $500,000. (5) Shivawn Newsome was adversely affected by defendants' pattern or practice of sexual harassment and/or retaliation, and by defendants' custom or usage of sexual harassment or retaliation; she is hereby awarded $75,000. (6) Tyrone Posey was adversely affected by defendants' pattern or practice of retaliation, but not by defendants' custom or usage of retaliation; he is hereby be awarded $75,000. (7) Teresa Washington was adversely affected by defendants' pattern or practice of sexual harassment and/or retaliation, but not by defendants' custom or usage of sexual harassment or retaliation; she is hereby awarded $75,000.

Having made an express determination that there is no just reason for delay, the court, pursuant to Fed. R. Civ. P. 54(b), hereby enters FINAL JUDGMENT ON THE JURY VERDICTS as to defendants' liability to the plaintiff class, and as to defendants' liability for damages to the individual named plaintiffs as set forth herein.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: Aug. 9, 1995

[Filed Nov. 25, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7207

SHARON BONDS, *et al.*,
Appellees

v.

DISTRICT OF COLUMBIA and MARGARET A. MOORE,
Appellants

BEFORE: Edwards, Chief Judge, Ginsburg and Rogers, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed September 23, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Nov. 25, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7207

SHARON BONDS, *et al.*,
Appellees

v.

DISTRICT OF COLUMBIA and MARGARET A. MOORE,
Appellants

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Roberts and Tatel, Circuit Judges

ORDER

Appellees' Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Tatel dissenting from the denial of rehearing *in banc*, joined by Circuit Judges Wald and Sentelle, is attached.

Tatel, *Circuit Judge*, with whom Wald and Sentelle, *Circuit Judges*, join, dissenting from denial of rehearing *en banc*. Because this case presents a fundamental question of district court power to control discovery proceedings, and of appellate court authority to override district court decisions, I think this case is worthy of *en banc* review. Of greatest concern to me is the panel's willingness to second-guess the district judge's key factual findings, especially his findings that the District acted in bad faith and that lesser sanctions would not remedy the District's discovery violation. I also think the panel did not give enough weight to the district court's express warning to the District that "any witness not identified in response to [Interrogatory No.] 2 who could reasonably be identified by November 7 . . . may not be called at trial." Moreover, after warning the District and issuing the sanction, the district court allowed the District to seek reconsideration—an option the District chose not to pursue for almost a month.

Appellate courts must use great caution in overruling district judges in the way they run their courtrooms lest they undermine the basic authority of district judges to control the proceedings before them. "[H]ere, as in other areas of the law, the most severe in the spectrum of sanctions . . . must be available to the district court in the appropriate case, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

[Filed Nov. 21, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-2420
(RCL)

BESSYE NEAL, *et al.*,
Plaintiffs,

v.

MARGET MOORE, Acting Director,
D.C. Department of Corrections, *et al.*,
Defendants.

ORDER

This case came before the court on November 17, 1994 for a status conference regarding disputed discovery issues and other matters. After giving consideration to status reports submitted by the parties and oral arguments of counsel at the hearing, and for the reasons stated on the record in open court, it is hereby ORDERED that:

1. Defendants' motion for a protective order against taking further depositions by plaintiffs without leave of court is DENIED.

2. The protective order entered by this court on May 2, 1994 is amended to require that defendants identify within ten days of document production or transcript receipt the particular documents and deposition testimony they wish to have protected.

3. Pursuant to Fed. R. Civ. P. 26(b)(1), the court has determined that the 26 personnel files identified in plaintiffs' third request for production of documents may

contain relevant information reasonably calculated to lead to the discovery of admissible evidence. Defendants are directed to produce the 26 files on or before November 28, 1994, subject to the provisions of the May 2, 1994 protective order.

4. Defendants are admonished that the court's order of November 2, 1994 required identification of witnesses who may be called at trial. Defendant's failure to identify any witnesses, by name, in response to plaintiffs' Interrogatory 2, indicates that no witnesses may be called at trial unless defendants successfully move for reconsideration of the November 2, 1994 order.

5. Oral argument regarding plaintiffs' Interrogatory 5 (further information on prior cases of sexual harassment) and Interrogatory 12 (information on defendants' training procedures on sexual harassment) shall be held at the hearing previously scheduled for November 22, 1994 at 2:00 p.m.

6. Regarding plaintiffs' Interrogatory 6 (support for defendants' contention that actions toward plaintiffs were necessary and non-discriminatory) and Interrogatory 7 (support for defendants' contention that plaintiffs were injured by their own conduct): Plaintiffs are instructed to file a motion to compel discovery by November 30, 1994. Defendants' opposition shall be due on December 9, 1994.

7. Defendants are directed to supplement their response within ten days of the date of this order to plaintiffs' Interrogatory 8 seeking support for defendants' contention that plaintiffs have not exhausted their administrative remedies.

8. Plaintiffs are granted leave to re-open the depositions of Michelle Elzie, Patricia Britton and Shirley Harmon, whose prior testimony related to pending contempt or preliminary injunction proceedings rather than the underlying merits of this case.

9. Plaintiffs are granted leave to depose John Noble and Gwen McCathorine within the December 16, 1994 cutoff previously set for all discovery.

10. Defendants are directed to designate a Rule 30(b)(6) witness who can provide information regarding training in sexual harassment matters given to all employees. Defendants may include all or part of the prior deposition of Adrienne Poteat in their designation.

11. Plaintiffs shall be considered to have made an oral motion at this hearing to protect Bessye Neal against resumption of her deposition. Defendants' oral response shall be received at the hearing previously set for November 22, 1994 at 2:00 p.m.

12. A schedule for oral argument on plaintiffs' first motion for an order to show cause why defendants should not be held in cirminal contempt shall be established at the hearing on November 22, 1994.

13. Defendants' motion to strike plaintiffs' third motion for an order to show cause is DENIED.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: 11-18-94

[Filed May 20, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7207

SHARON BONDS, *et al.*,
Appellees

v.

DISTRICT OF COLUMBIA and MARGARET A. MOORE,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 93cv02420

Before: EDWARDS, *Chief Judge*, GINSBURG and ROGERS, *Circuit Judges*.

ORDER

These appeals involve a class action brought by employees of the District of Columbia Department of Corrections, alleging a pattern or practice of sexual harassment against women employees, both by creating a hostile working environment and by conditioning job benefits on the granting of sexual favors, and a pattern or practice of retaliation against employees opposing such sexual harassment. After sequential trials before a jury on liability and damages, the district court entered judgments against defendants on behalf of the plaintiff class and of all the named plaintiffs but one. The district court also awarded equitable relief to the prevailing named plaintiffs and entered an order directing class-wide injunctive relief. Pro-

ceedings for the absent class members continue in the district court. By order of January 18, 1996, this court stayed implementation of the class-wide injunctive relief. On May 14, 1996, this court heard oral arguments in the appeals by the defendants from the three district court orders.

Having reviewed the parties' briefs and the record, and having heard oral argument, is is hereby ordered, for the reasons set forth in the accompanying memorandum, that the record in this appeal be remanded to the district court to supplement its findings of fact and conclusions of law with regard to the imposition of a discovery sanction under Federal Rule of Civil Procedure 37(b)(2) and (d) whereby the defendants were precluded from calling any fact witnesses at trial. The district court shall explain why a lesser sanction, in particular that proposed by the plaintiffs on November 15, 1994, would not have sufficed fully to address the district court's legitimate concerns about maintaining a firm trial date, avoiding prejudice to the plaintiffs, not allowing the defendants to benefit from their disobedience of a court order, and deterring the defendants from failing to comply in the future.

The district court shall submit its findings to the Clerk of this court within 30 days of the date of this order. Consistent with D.C. Circuit Rule 41(b), the court retains jurisdiction over the case pending the district court's submission of the supplemental findings.

Per Curiam

FOR THE COURT:

/s/ Mark J. Langer
MARK J. LANGER
Clerk

MEMORANDUM

To assist the district court on remand, we briefly recount relevant portions of the record and the court's findings and conclusions of August 9, 1995, regarding the sanctions imposed on the defendants under Federal Rule of Civil Procedure 37(b)(2) and (d).

I.

On September 29, 1994, the plaintiffs submitted a set of interrogatories, including interrogatory no. 2, which asked the defendants to "[i]dentify all persons with knowledge of or evidence that concerns the matters set forth in [the complaint] and, for each such person, describe the matters concerning which such person has knowledge or evidence." In responding to the defendants' motion of October 24, 1994, for a two-week continuance of the date when responses to plaintiffs' interrogatories were due, the plaintiffs requested that the court order that the defendants be precluded from calling any witnesses that were not identified in response to interrogatory no. 2 by November 7, 1994, and could reasonably have been identified by that date. The district court's order of November 2, 1994, so stated.

After receiving the defendants' belated response to the interrogatories on November 10, 1994, however, the plaintiffs argued for a lesser sanction. In their status report to the district court of November 15, 1994, the plaintiffs proposed that, as a sanction for the defendants' failure to comply with the court order, "absent good cause shown, the defendants be limited at trial to call only witnesses whom the plaintiffs have deposed and be limited in their examination to topics the plaintiffs have covered in deposition." The defendants argued in their status report to the district court of November 16, 1994, that they "should not be precluded from calling [any] witness identified within a reasonable period after the close of discovery as long as the existence of the witness and the substance of

the testimony is seasonably disclosed." At the November 17, 1994, discovery hearing, the district court ruled that, pursuant to its November 2 order, the defendants would be precluded from calling at trial any fact witnesses. In a colloquy with the plaintiffs' counsel, the district court stated, "So this trial will be without any [fact] witnesses for the defendant unless I modify or reconsider that order. . . . You've already won your whole case right there.

The defendants' December 12, 1994, motion for reconsideration of the discovery sanction argued that, given the absence of willful misconduct, defendants' supplemental answer to interrogatory No. 2, and the absence of prejudice to the plaintiffs or the court's calendar, total preclusion was "a Draconian measure unwarranted under the circumstances of this case, tantamount the entry of a default judgment, and in sharp contrast to the relief requested by plaintiffs." The motion for reconsideration also called the district court's attention to the plaintiffs' proposed lesser sanction of November 15, 1994. In their December 19, 1994, opposition to the motion for reconsideration, the plaintiffs argued that the supplemental answer to interrogatory No. 2 remained inadequate and that the preclusion order was an appropriate sanction. At the December 21, 1994, discovery hearing, the defendants observed that "[t]he one question plaintiffs do not address is the question of prejudice."

II.

The district court's memorandum opinion of August 9, 1995, sets forth the court's findings and conclusions regarding the discovery sanction imposed under Rule 37(b)(2) and (d) against the defendants. The opinion at no point addresses the plaintiffs' alternative, lesser preclusion request of November 15, 1994.

In evaluating what it viewed as a milder sanction than the entry of a default judgment, the district court listed the three factors that we set forth in *Bristol Petroleum Corp.*

v. Harris, 901 F.2d 165, 167 (D.C. Cir. 1990), and which the district court applied in *Monroe v. Ridley*, 135 F.R.D. 1, 5 (D.D.C. 1990):

> the effect of [the party's] dilatory or contumacious conduct on the court's docket, whether the [party's] behavior has prejudiced the [opposing party], and whether deterrence is necessary to protect the integrity of the judicial system.

Yet *Bristol* instructs courts to consider these three factors "to ascertain[] when dismissal [or default judgment], rather than a milder disciplinary measure, is warranted" 901 F.2d at 167. *Bristol* notes also that, "[a]s a rule, . . . dismissal is in order only when lesser sanctions would not serve the interest of justice." *Id.* In *Shea v. Donohoe Construction Co.*, 795 F.2d 1071 (D.C. Cir. 1986), upon which *Bristol* relied, we declared,

> Of course, outright dismissal even where the other party has been prejudiced may not be appropriate where less drastic action is available to cure the harm. "Since our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success" or would obviously prove futile.

795 F.2d at 1075 (quoting *Trakas v. Quality Brands, Inc.*, 759 F.2d 185, 186-87 (D.C. Cir. 1985)). In cases involving prejudice to the judicial system, we also "cautione[d] that, as a general mater, it is still incumbent upon the trial court to consider" "remedial action less drastic than outright dismissal." *Id.* at 1076. And when the purpose of the sanction is deterrence of future misconduct, dismissal or default judgment "has been deemed a disproportionate sanction" unless "the client himself is shown to deserve the sanction." *Id.* at 1077. These principles apply to discovery sanctions under Rule 37.

We have no quarrel with the district court's application of the *Bristol* factors in considering a sanction under Rule 37(b)(2) and (d) that it viewed as milder than the entry of a default judgment. Were we to conclude that the preclusion sanction imposed by the district court was tantamount to a default judgment, there would be no question, as *Bristol* and *Shea* make clear, that the district court must consider lesser sanctions. Because under the circumstances the severity of the sanction imposed by the district court at least approaches that of a default judgment, we conclude that the same considerations apply. The "concept of proportionality" requires the court to consider whether less drastic sanctions are appropriate. *See Shea,* 795 F.2d at 107; *Butler v. Pearson,* 636 F.2d 526, 531 (D.C. Cir. 1980). Consequently, as the district court acknowledged in setting forth the three factors from *Bristol,* it was required to consider those factors in evaluating whether the total preclusion order, rather than the plaintiffs' proposed lesser alternative, was a just sanction.

Instead of adressing the lesser sanction proposed by the plaintiffs in their status report of November 15, 1994, however, the district court proceeded without apparent regard to that proposal or to the defendants' argument that total preclusion was Draconian and that the plaintiffs' lesser sanction would not disrupt the court's calendar or prejudice the plaintiffs. Erroneously, the court saw a limited choice: either preclude the defendants from calling any fact witnesses or continue the trial date so that the plaintiffs could take additional depositions and prepare for trial. Although, in the absence of findings as to the potential effectiveness of a lesser sanction, we could review the record independently, *see Adriana Int'l Corp. v. Thoeren,* 913 F.2d 1406, 1412 (9th Cir. 1990), *cert. denied,* 498 U.S. 1101 (1991), we have observed in other circumstances when the district court's action is subject to review for abuse of discretion, that:

> A statement of reasons is always highly desirable. Not only does it facilitate appellate review, but more importantly, it helps to insure that the District Court considers carefully the arguments for and against [a particular action].

In re Pope, 580 F.2d 620, 623 (D.C. Cir. 1978) (per curiam).

By remand of the record in this appeal, the district court will have an opportunity to explain, in light of the severe nature of the sanction, why it did not adopt a lesser sanction, such as a sanction under which the defendants would have been limited to calling as witnesses persons whom the plaintiffs had already deposed or scheduled for deposition as of November 7, 1994.

[Filed Jun. 19, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-2420
(RCL)

BESSYE NEAL, *et al.*,
Plaintiffs,

vs.

DIRECTOR, D.C. Department of Corrections, *et al.*,
Defendants.

STATEMENT OF REASONS ON REMAND

Pursuant to the remand Order entered by the Court of Appeals on May 20, 1996, the Court hereby makes the following additional findings of fact and conclusions of law regarding the discovery sanction entered in this case to supplement the findings and conclusions entered in Memorandum Opinion I, isued by this court on August 9, 1995.

1. By the time the Court imposed the discovery sanction now at issue on appeal, this court already had been presented with an abundance of evidence of defendants' routine failure to comply with the rules governing discovery in this action. At the same time, defendants had committed repeated acts of retaliation against those named plaintiffs who were still employed by the Department of Corrections. Several of these acts of retaliation were taken in *direct contravention* of preliminary injunctions issued by this Court to prohibit such retaliation. Defendants' blatant disregard of this Court's Orders ultimately

compelled the Court to cite defendants for civil contempt on four separate decisions. The Court's selection of the discovery sanction at issue here must be considered in this context.

2. From March 28, 1994 through November 17, 1994, 12 status conferences were held in this case. Problems with defendants' responses to outstanding discovery requests were identified in 10 of the 12 status conferences, including the last one in which the Court stated that it would impose the Discovery Sanction contained in its November 2, 1994 Order. Specifically, the conferences addressed the following discovery problems:

   a. March 28, 1994: Defendants disclosed for the first time that they were making only a partial production in response to plaintiffs' First Request for Production of Documents, which was due that day, March 28, 1994, and requested an extension of 30 days in which to respond to the bulk of plaintiffs' requests. The motion was granted. *See* Transcript at 8-10. During that same status conference, the first temporary restraining order was issued to prevent the retaliatory demotion of named plaintiff Bessye Neal.

   b. April 8, 1994: Plaintiffs took issue with defendants' March 28 partial response to their request for production of documents and informed the Court that they had filed a motion to compel earlier that day. Defendants represented that they were producing more documents, and in reliance upon defendants' representation, the Court postponed hearing the motion to compel until April 26, 1994. *See* Transcript at 8-13.

   c. April 26, 1994: Plaintiffs again raised their motion to compel. Defendants, who had not yet produced *any* additional documents despite the

month-long extension, sought a further extension of time to produce documents, to May 2, 1994. The Court granted this extension. At this same status conference the Court heard argument on a preliminary injunction to block a transfer and effective demotion of named plaintiff Bessye Neal. After hearing argument from both parties, and reviewing deposition transcripts submited by both parties, the Court issued the first preliminary injunction barring the Department from transferring and effectively demoting named plaintiff Bessye Neal, because the Court found defendants' motive to be retaliatory. Plaintiffs also filed their second motion for a preliminary injunction regarding actions taken against another plaintiff and the husband of a third plaintiff.

June 7, 1994: At this status conference, the Court heard both parties' arguments on plaintiffs' motion for a second preliminary injunction. Based on a review of deposition transcripts, pleadings and argument submitted by both parties, the Court issued a second preliminary injunction barring proposed disciplinary action against plaintiff Tyrone Posey and Dennis Brummell, husband of plaintiff Vera Brummell, and barring all future retaliation against any named plaintiff. In reviewing the inconsistent and contradictory testimony of Department officials revealed in the deposition transcripts, the Court indicated that it found the testimony of defendants' witnesses to be knowingly inaccurate. *See* Transcript at 3.

June 30, 1994: Plaintiffs sought the Court's assistance in scheduling a deposition pursuant to Rule 30(b)(6) that was needed for preparation of their motion for class certification that was due on July 30, 1994. Counsel for defendants stated that she was unavailable on any

day for the month of July, although she had previously told plaintiffs, and later confirmed to the Court, that she did not have any commitments elsewhere on the day the plaintiffs had sought to schedule the deposition. Counsel for defendants refused to offer a designee for the Rule 30(b)(6) deposition, because counsel represented she was too busy, although she had no appointments scheduled for that day. Defendants refused to schedule the deposition for any other day in July, making it impossible for plaintiffs to complete this critical discovery before the class certification motion was due. Faced with this situation, the Court told the palintiffs: "You just note your date, Mr. Kaplan. If they don't show, you proceed without them." *See* Transcript at 2-5.

f. August 2, 1994: This was one of only two status conferences at which no unresolved discovery issues were raised.

g. August 19, 1994: Plaintiffs sought the Court's assistance in having employees of defendants appear for depositions. It was the understanding of both plaintiffs and the Court that Corporation Counsel had previously agreed that deponents who were current employees would appear without subpoena. However, several high ranking Department employees, who were clearly managing agents—such as Warden John Henderson and Associate Director William Plaut—failed to appear or gave only one day's notice that they would be unavailable for deposition on the days scheduled by plaintiffs. Counsel for defendants asserted that, other than with respect to officials at the assistant administrator level or higher, they had offered only to *seek* voluntary cooperation from the witnesses. As transcripts of the prior status

conferences were then unavailable, the Court took the issue under advisement, and on August 25, 1994, issued an order resolving the issue so that depositions could proceed. *See* Transcript at 8, 17.

h. September 9, 1994: Plaintiffs advised the Court of their growing concerns regarding defendants' continued failure to produce a substantial portion of documents originally due on March 28, 1994, despite plaintiffs' repeated requests for production, and despite the fact that the last extension granted defendants only enlarged the time for production until May 2, 1994. Defendants simply arrogated to themselves the authority to decide whether and when they would produce *any* documents, and told the court repeatedly that it was impossible for them to comply with the discovery rules then in place. The sheer arrogance of the defendants, who now seek to place themselves above the law and make themselves completely unaccountable to the court, is perhaps best illustrated by this example of how they "complied" with document production. Defendants neither objected to producing the documents for which requests were outstanding, nor asserted, in their explanation for the delay in production, that they had objected to producing these documents. The Court asked defendants at the September 9 status conference if they would produce the identified documents in 10 days, and defendants finally agreed to do so. On September 15, 1994, the Court entered an Order directing defendants to supplement their production with the outstanding documents by September 23, 1994. Schedules were also established for the *two* contempt motions relating to violations of the preliminary injunction that were pending. *See* Docket September 9, 1994; Court's Order of September 15, 1994.

i. September 30, 1994: Plaintiffs stated that defendants still had not complied with the Court's September 15 Order to satisfy the outstanding document requests. Specifically, plaintiffs noted that many of the documents identified at the September 9 status conference had not been produced by defendants, including at least 10 files of sexual harassment complaints that plaintiffs had identified by name, as well as specific statistical information referred to in other documents. Defendants raised objections to depositions scheduled by plaintiffs, including the Rule 30(b)(6) deposition that had been scheduled to obtain information regarding persons with knowledge of the facts in the complaint. Plaintiffs offered to withdraw this deposition notice if defendants supplied the information sought in written form by October 4, 1994, the date for which the deposition had been scheduled. The Court directed the parties to meet and attempt to resolve these issues, and set a further status conference to address unresolved discovery issues. *See* Court's Order of October 4, 1994.

j. October 6, 1994: The Court extended the schedule for non-expert discovery to December 16, 1994. Plaintiffs agreed to forego the Rule 30(b)(6) deposition based on a commitment from the defendants that they would respond timely to Interrogatory No. 2. The Court denied defendants' motion to stay discovery while mediation was in progress. Further matters related to the show cause motions were discussed. *See* Court's Order of October 13, 1994.

k. October 17, 1994: This conference was held in chambers, with no court reporter, but Memorandum Opinion I of August 9, 1995, at 6-7, describes part of what occurred.

l. November 17, 1994: In the interim, since the last status conference, the defendants had failed to respond to plaintiffs' Interrogatory No. 2 as required by the Court's Order of November 2, 1994. It was at this November 17 status conference that plaintiffs brought defendants' noncompliance to the Court's attention. The Court imposed the discovery sanction stated in the November 2 Order, and offered defendants an opportunity to seek reconsideration. In addition, the Court also ordered defendants to respond further to other interogatories.

3. Over this same time period in which these discovery disputes and reprisal allegations arose—February through November 1994—defendants filed no fewer than 9 motions for extensions of time to respond to discovery or to file pleadings. Each of these motions was filed *on or after* the day on which the pleading or discovery was due. All were granted *nunc pro tunc*. *See* Docket Numbers: 3, 5, 10, 15, 28, 29, 64, 66, 67, 74, 110, 118, 114, 119, 109, 120, 124, and 139. These extensions were sought despite the Court's repeated admonition to staff the case properly so that the schedule could be met. *See* Memorandum Opinion I, at ¶¶ 1-2.

4. At the same time that defendants were repeatedly failing to produce, or producing late, responses to plaintiffs' discovery requests, defendants were also engaged in multiple acts of retaliation against the named plaintiffs in violation of Orders of this Court. *See* Docket Numbers 58, 69, 64, 122, 127, 128, and 129.

5. On October 24, 1994, the date on which their response was due, defendants filed a motion for an extension of time until November 7, 1994, to respond to plaintiffs' First Set of Interrogatories. Because of

defendants' prior pattern of delay, repeated requests for extensions, and tardy production of documents, this Court found it necessary to make clear that defendants' failure to respond to Interrogatory No. 2 within the specified time would have definite and clear consequences. The November 2, 1994 Order gave defendants explicit notice of the consequences of their failure to furnish a timely and complete interrogatory response, and defendants raised no objection to the Order until after they had violated it.

6. Despite being forewarned of the consequences of a failure to respond, and being granted the full extention of time they had sought to respond to plaintiffs' interrogatories, defendants did not identify a single person in response to Interrogatory No. 2 filed (late) on November 10, 1994.

7. The Court considered a lesser sanction for defendants' failure to respond in accordance with the Order.[1] However, precisely because a specific Order

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[1] As the Court of Appeals notes, this Court stated to plaintiffs at the hearing on November 17, 1994, "You've won your case right there." However, as should be clear from the context of the exchange, in which motions to compel responses to interrogatories were discussed, because of the discovery sanction there was no need for plaintiffs to file a motion to compel a response to Interrogatory No. 2. The November 2 Order gave plaintiffs all the relief necessary to redress the defendants' failure to respond. Thus, "your case" clearly referred to plaintiffs' "case" on the motion to compel, *not* the "case" on the merits. Indeed, plaintiffs had *not* won their case on the merits. Plaintiffs still had to put on their case, subject to vigorous cross-examination at trial, and persuade a jury of the merits of their case. Plaintiffs had won a victory, but certainly not their entire case. More careful wording by the Court would have been that plaintiffs had just won their argument or their motion, not their case. The Court regrets its imprecise wording, but notes that defendants appear to have knowingly misconstrued this status in order to portray this court as having entered a total default even though this Court chose a lesser sanction.

of this Court had been issued, including an explicit statement of the consequences of any failure to respond, the Court did not choose a lesser sanction. Enforcement of the Court's November 2, 1994 Order was absolutely necessary to establish that Orders of this Court were to be obeyed, and defendants could not continue to ignore them with impunity. During my tenure on the bench, this Court has not witnessed a more blatant and widespread disrespect for judicial authority than occurred in this case. In the first contempt trial, a Sergeant at the Department of Corrections who retaliated against a named plaintiff could not be held in contempt for violating the Court's June 7, 1994, preliminary injunction (prohibiting further retaliation against the named plaintiffs) because, as of September 28, 1994, the Department of Corrections had taken no steps whatsoever to carry out the Court's preliminary injunction and the plaintiff's direct supervisor had no knowledge of the Order and could not be held in contempt for violating it. The Director of the Department of Corrections testified that since the Court's Order had been widely publicized in the Washington Post, she assumed everyone would know about it and comply with it. The Court found the Sergeant's testimony credible that she didn't subscribe to the Washington Post and that no one ever told her about the Order. Initial remedial action was taken on September 28, 1994, and the Court subsequently held the Director in contempt —one of the four civil contempt citations issued by this Court. Finally, it became necessary—due to retaliation in the midst of the March 1995, trial to cite two officials for *criminal* contempt for retaliation against a witness. The criminal contempt citations were appealed, and this Court was affirmed. No appeal was ever prosecuted as to any of the four civil contempt citations. Criminal contempt trials are now

pending against five more Corrections Department officials. This Court has never witnessed such a total breakdown of any respect for judicial authority.

8. Imposition of a lesser sanction on defendants than the sanction adopted by the court on November 17, 1994, would have failed to protect the integrity of this Court's authority, particularly in light of defendants' failure on prior occasions to comply with promises made to the Court. *See, e.g., Update Art. Inc. v. Modim Pub. Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988) (noting that preclusion of evidence may be necessary to "achieve the purpose of Rule 37 as a credible deterrent rather than a 'paper tiger.' ").

9. After ruling that this Court's Order would be enforced, the Court nonetheless invited defendants to seek reconsideration, giving them an opportunity to redeem themselves and file a complete response to Interrogatory No. 2 or explain their noncompliance. Defendants, however, refused either at the November 17, 1994 status conference or in later pleadings even to acknowledge that they had failed to comply with the Court's Order. Rather, defendants claimed that their answer was adequate because they had "identified" persons, and that their response was consistent with Rule 33(c), although they had not invoked Rule 33(c) in their interrogatory response.

10. Plaintiffs had initially suggested a lesser sanction in their papers filed November 15, 1994. The Court declined to impose the lesser sanction, however, largely because it would not have comported with the sanction that the defendants had earlier been admonished would be imposed. The threat of sanctions cannot be an idle one. When, as in this case, a party has been apprised that further non-compliance with discovery rules will be met with a specific sanction, it is incumbent upon the court to carry out that sanction.

To do otherwise, particularly in a case such as this one, would no doubt compromise both the integrity of this court and legitimacy of the judicial process. Especially in light of defendants conduct throughout 1994, detailed above, the lesser sanction would not have provided defendants sufficient deterrence against further violations of this Court's Orders. Defendants' current suggestion that this court never considered a lesser sanction is ludicrous. The Court necessarily had to consider a lesser sanction since even the plaintiffs initially suggested one. In the Court's view, however, a total default would have been justified, so the lesser sanction of just imposing what the Court said it would do was certainly justified.

11. Furthermore, adoption of the lesser sanction would have prejudiced plaintiffs. While barring defendants from calling witnesses not desposed would have addressed the prejudice to plaintiffs' ability to effectively cross-examine those witnesses, it would *not* have redressed in any way the prejudice caused plaintiffs by their own inability to call witnesses who may have been *helpful* to their case, but whose identities were not revealed by defendants. In short, the lesser sanction would have permitted defendants to benefit from their discovery violation by permitting them to conceal the identities of witnesses whose knowledge or testimony could have been helpful to the plaintiffs. Plaintiffs set forth at Page 11, of their opposition to the defendants' motion for reconsideration of the sanction, the nature of the prejudice that they would suffer if this court were to overturn its prior ruling. The Court of Appeals noted that, at the December 21, 1994, hearing before this Court, the defendants observed that "[t]he one question plaintiffs do not address is the question of prejudice." Defendants argument is wrong.

12. Deprived of adequate information identifying the 1,000 witnesses in the supplemental response, and furnished with a list compiled without legal judgment and including elevator operators and dead people, plaintiffs would have been required to take numerous depositions to counter the prejudice resulting from defendants' inadequate response. If plaintiffs had been granted the time necessary to comb the list and depose countless additional persons to determine if their knowledge or testimony would have been helpful to plaintiffs' case, then the date for this lengthy trial clearly would have been placed in jeopardy. Even more important than the trial calendar of this Court, postponement of the trial would have afforded defendants additional time and opportunity to engage in their ongoing course of repeated retaliation.

13. To the extent that defendants are correct in their claim that plaintiffs "knew" defendants' case, "knew" who the relevant witnesses were, and deposed most of them, it should be noted that this claim merely establishes that limiting defendants to calling those witnesses identified and deposed by plaintiffs would have been no sanction whatsoever. Put another way, the lesser sanction would have effectively allowed defendants, by their failure to obey this Court's Order, to limit the roster of witnesses to those whom plaintiffs would have found out about, the defendants would have used in any event. Defendants would have violated an explicit court Order with absolute impunity unless a more severe sanction were issued.

14. Had there been any question about the propriety of the discovery sanction imposed, it was laid to rest for this Court by the manner in which defendants sought reconsideration of that sanction. Defendants waited nearly a month to seek reconsideration. When they did so, their motion papers raised objections to the interrogatory that had not been previously made.

Under Rule 33(b)(4), objections not made at the time the response is filed are waived, unless the Court finds good cause is shown. At the hearing on the motion for reconsideration, defendants shifted ground once again and claimed *for the first time* that they had not received the November 2, 1994 Order until November 7, 1994, the date on which their response to Interrogatory No. 2 was due. Even if this new rationale were convincing, it did not relieve defendants of responsibility for knowledge of the Order, since defendants did not file their response until November 10, 1994. The Court finds that defendants' shifting explanations undermine their attempts to justify their conduct. In addition, defendants' supplemental response did not comply with the Court's Order and did not provide an adequate response to Interrogatory No. 2, as described in ¶¶ 15-18 of Memorandum Opinion I. The 1,000 names were not compiled in good faith, and the Court could not grant the defendants' motion for reconsideration.

15. Curiously, defendants did not even seek to call at trial any witnesses whom they could not reasonably have identified on November 7, 1994, as the Court's earlier Order expressly permitted. Nor did defendants show they had made reasonable efforts to identify any witnesses by November 7, 1994, the date on which their interrogatory response was due.

16. Accordingly, a lesser sanction would not have addressed the prejudice to plaintiffs, while simultaneously allowing defendants to benefit from their willful discovery violation. The only cure to the prejudice caused plaintiffs by their inability to identify witnesses whose knowledge or testimony would have been helpful would have required an extension of the discovery period and a postponement of the trial date. At the same time, the lesser sanction would have failed to provide any deterrence against

defendant's repeated infractions of the discovery rules and the orders of this Court.

17. To the extent that the rationale for the discovery sanction imposed rests on deterrence, the actions leading to and surrounding the discovery sanction are attributable to the defendant District of Columbia, as well as the Office of the Corporation Counsel. *See Shea v. Donohoe Construction Co.*, 795 F.2d 1071, 1077 (D.C. Cir. 1986). The Office of the Corporation Counsel is a creation of the District of Columbia. The Corporation Counsel is appointed by the Mayor of the District of Columbia. It is the Mayor and D.C. Council who control the budget of the Corporation Counsel. In this respect, the attorney-client relationship here is very different from those in which the attorney and client become associated for discrete matters. Here, the Office of the Corporation Counsel, whose attorneys defended this case, is a creation of the client.

18. Actions of the Department of Corrections created the situation in which the discovery sanction was necessary. First, it was the Department of Corrections' repeated acts of retaliation, despite preliminary injunctions and contempt citations, which made an early trial date so imperative. It was this imperative which led the Court to issue Orders with clear deadlines and explicit consequences. Second, as defendants themselves acknowledge, the resources of the Corporation Counsel were repeatedly diverted to defending the Defendant's conduct in several show cause hearings during the same time that defendants' responses to interrogatories were due. If the Department had not repeatedly violated the court's preliminary injunction, then its counsel would have had more time to devote to responding to Interrogatories, instead of defending what the Court ultimately found to be contemptuous conduct on the part of the De-

partment.[2] Therefore, in a very real sense, the Department's own conduct caused the defendants' failure to respond to Interrogatory No. 2. This Court finds quite disturbing the tenor of the Corporation Counsel's arguments to the Court of Appeals that chronic office under-staffing caused this sanction to be imposed. While under-staffing was no doubt a contributing factor, the real reason that the assigned Assistant Corporation Counsel had no time to attend to required discovery was because she was constantly defending outrageous and contemptuous conduct by the defendants. Time and again there were incidents of retaliation and a temporary restraining order, preliminary injunction, and eventually followed by motions for a contempt hearing. On a number of occasions, this Court found defendants' witnesess at these hearings to be testifying falsely. Nevertheless, the assigned counsel continued to defend every outrageous act of retaliation, giving insufficient time for discovery. History has been rewritten in the appellate briefs, which this Court finds so misleading as to be virtually dishonest. Indeed, in the defendants' June 10, 1996, comments on plaintiffs' proposed supplemental findings and conclusions at page 15, the Corporation Counsel argues that "it is difficult to imagine how the defendants would benefit from a lesser sanction when the plaintiffs had been provided with the bulk of the documentary discovery since at least June of 1994 . . . ." The dishonesty of this argument is well demonstrated by the transcripts of all the hearings set forth above where this Court continued after June of 1994 to spend untold hours prying documents out of defendants.

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[2] Defendants withdrew their appeal of the contempt rulings, and the appeal was dismissed February 27, 1995.

19. Even without the special relationship existing here, the Supreme Court has expressly found that the misconduct of an attorney may be attributed to a party for the purpose of entering a sanction. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962), the Court held:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposed an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequence of the acts or omissions of this freely selected agent.

Id.; *see also Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1387 (9th Cir. 1988) (affirming dismissal of the plaintiffs' case due to failure to comply with discovery orders).

20. Even more recently, the Supreme Court affirmed dismissal of a Title VII claim because of attorney negligence in meeting the filing deadline. The Court reiterated its holding in *Link*, stating:

> Under our system of representative litigation, "each party is deemed bound by the acts of this lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' "

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 92 (1990) (quoting *Link v. Wabash Railroad Co.*, 370 U.S. 626, 634 (1962)).

21. While the D.C. Circuit, in *Shea v. Donohoe Construction Co.*, 795 F.2d 1071, 1077 (D.C. Cir. 1986), has held that when the purpose of the sanction is deterrence of future misconduct, the most severe sanctions should not be imposed unless "the client himself is shown to deserve the sanction," the

purpose of the sanction in this case went beyond deterrence to include avoiding prejudice to plaintiffs, preventing defendants from benefitting from their misconduct, and avoiding burdensome changes to this Court's schedule.

22. Moreover, as noted above, the District of Columbia has greater knowledge of and control over the Office of Corporation Counsel than does the average client over his or her attorney. The defendant itself is chargeable with knowing of the existence and contents of this Court's November 2, 1994 Order, and therefore with the failure to comply with it. The District of Columbia made a choice in this case. The District of Columbia chose to limit attorney staff time it could devote to this case, despite the fact that this litigation had become bogged down in contempt and other hearings due to on-going retaliation against the plaintiffs. The District of Columbia voluntarily chose not to comply with this Court's discovery Orders. Statistics about the number of cases pending cannot justify imposition of a lesser sanction, particularly when a lesser sanction would prejudice plaintiffs and reward defendants for their unlawful disregard of judicial authority. Defendants are not above the law, and plaintiffs are entitled to have their day in court not on defendants' terms, but on terms set by the Court's rules and Orders.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: 6-19-96